

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.) DOCKET NO. 6:06cv324

-vs-

BUFFALO TECHNOLOGY, INC.,) Tyler, Texas
ET AL) March 26, 2009
9:00 a.m.

MICROSOFT CORPORATION, ET AL)
DOCKET NO. 6:06cv549

-vs-

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.)

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.) DOCKET NO. 6:06cv550

-vs-

TOSHIBA AMERICA, ET AL)

INTEL CORPORATION, ET AL)
DOCKET NO. 6:06cv551

-vs-

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, INC.)

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S
(SIGN-IN SHEETS DOCKETED IN EACH CASE)

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. Ms. Ferguson, if you will call the case,
4 please.

5 THE CLERK: Court calls Case No. 6:06cv324, CSIRO v.
6 Buffalo; 6:06cv549, Microsoft, et al v. CSIRO; 6:06cv550,
7 CSIRO v. Toshiba, et al; 6:06cv551, Intel, et al v. CSIRO.

8 THE COURT: Announcements.

9 MR. CAPSHAW: Your Honor, for the Plaintiff CSIRO,
10 Calvin Capshaw, Dan Furniss, Greg Gilchrist, John Lord, Gary
11 Ritchey, and Jordan Jones for CSIRO. We have some other
12 people here, but these will be the speakers.

13 THE COURT: Very good. Thank you.

14 MR. VAN NEST: Good morning, Your Honor. Bob Van
15 Nest from Kecker & Van Nest for Defendant Intel. I am here
16 with my partners, Christa Anderson and Leo Lam; and with Mike
17 Jones from the Potter Minton Firm and John Bufe.

18 MR. KELLY: Thank you, Your Honor. Richard Kelly.
19 With me is my partner Robert Mattson on behalf of Buffalo,
20 Inc. Also, John Bufe and Mike Jones from Potter Minton.

21 THE COURT: Thank you.

22 MR. CORDELL: Good morning, Your Honor. Ruffin
23 Cordell from Fish & Richardson on behalf of Microsoft. With
24 me is Barry Shelton and Conor Civins. Jennifer Ainsworth, is
25 here as well; and our client Robert Lytle from Microsoft is

1 here.

2 THE COURT: Okay. Thank you.

3 Is that it?

4 MR. CORNELIUS: Your Honor, Bill Cornelius along
5 with Rich Vasquez for Accton, 3Com, SMC and D-Link.

6 THE COURT: Okay.

7 MR. WILCOX: Melvin Wilcox, Your Honor, on behalf of
8 Toshiba. I would like to introduce Mr. Irfan Lateef and Mr.
9 Craig Summers are also here. Also, I am standing in for Mr.
10 Yarbrough -- he sends his regrets -- on behalf of Belkin and
11 Mr. Craig Dawes -- Kris Dawes.

12 THE COURT: Thank you.

13 MR. ALBRITTON: Eric Albritton, Scott Stevens, and
14 Pat Benedicto for ASUS. We are ready.

15 MR. JACKSON: Tom Jackson and Dan Conrad from Jones
16 Day on behalf of D-Link, Your Honor.

17 MR. FINDLAY: Eric Findlay on behalf of Nintendo.
18 Also with me is Tom Friel and Matt Brigham from the Cooley
19 Firm.

20 MR. BRIGHAM: Good morning.

21 THE COURT: Good morning.

22 Is that it?

23 MR. SMITH: Ryan Smith on behalf of NetGear.

24 THE COURT: Okay. Anyone else?

25 All right. Let's -- Ms. Ferguson, if you will, go

1 ahead and call the second case.

2 THE CLERK: Case No. 2:07cv546, Rebecca Perdue, et
3 al v. Nissan Motor Company.

4 MR. TRACY: Todd Tracy and Melissa Smith on behalf
5 of the plaintiffs. Ready to proceed, Your Honor.

6 MR. PATTERSON: Jeff Patterson for Nissan, Your
7 Honor.

8 THE COURT: All right. Very well. All right. Just
9 to explain on both of these cases, the second case is set in
10 Marshall. This case is set in Tyler. The CSIRO case is the
11 earlier case and will take precedence. I believe we are
12 picking a jury in it on April 6th; is that correct?

13 MR. CAPSHAW: Yes, Your Honor.

14 THE COURT: Then in the Nissan case on April 7th; is
15 that correct?

16 MR. TRACY: Yes, Your Honor, it is.

17 THE COURT: Then we are going to start the evidence
18 in the CSIRO case here in Tyler on I believe April 13th; is
19 that right?

20 MR. CAPSHAW: Yes, sir.

21 THE COURT: And then the Nissan case will trail
22 whenever that is over, and I am in just a moment going to go
23 through the time estimates with the people, so you may want to
24 remain here for that. I don't know how long this pretrial
25 will take. I anticipate it could take an hour or so, so you

1 are welcome to wander in and out if you like to, the attorneys
2 in the Nissan case; but you might want to sit in for the first
3 part or you are welcome to sit in for all of it.

4 Let me go now to the pretrial in the CSIRO case.
5 Are there any settlements to be announced?

6 MR. FURNISS: Yes, Your Honor. Settlements have
7 been reached with defendants Hewlett-Packard and Fujitsu.

8 THE COURT: All right.

9 MR. TINDEL: Andy Tindel, Your Honor. I am here on
10 behalf of Fujitsu, and that is correct.

11 THE COURT: Do you need anything put of record?

12 MR. FURNISS: The request for dismissal in HP was
13 filed yesterday, Your Honor.

14 THE COURT: All right.

15 MR. FURNISS: No, nothing else on the record.

16 THE COURT: That is granted.

17 MR. TINDEL: Your Honor, I think all of our
18 paperwork is going to be finished, and our dismissal papers
19 will be filed on April 6th.

20 THE COURT: All right. Very well.

21 All right. Let me just inquire before we get into
22 the pretrial as to the status of mediation.

23 MR. FURNISS: Your Honor, Judge Faulkner has been
24 working hard --

25 THE COURT: He always does. He is a good mediator.

1 MR. FURNISS: Yes. There are ongoing discussions
2 with a number of parties. There are a couple of parties who
3 have not responded at all. And I think that -- Mr. Capshaw
4 and I talked to Judge Faulkner yesterday, and there are
5 ongoing discussions, as I said, with at least three or four
6 parties.

7 THE COURT: All right. Defendants?

8 MR. VAN NEST: Yes, Your Honor. I don't have
9 anything to add. I'm not sure when he says a couple of
10 parties that haven't responded at all. I do know that Judge
11 Faulkner has been working hard with all of us. A number of us
12 have been through more than one mediation. A fair number
13 of -- progress is being made.

14 THE COURT: Okay. Do you wish to add any
15 clarification, or do you want to talk with him about that
16 later?

17 MR. FURNISS: Well, just without naming them, I will
18 say there are two parties who have just absolutely refused --

19 THE COURT: Why don't y'all get together and discuss
20 that. It sounds like you are on different pages.

21 MR. FURNISS: Not Mr. Van Nest's client, Your Honor.
22 We have had discussions with them.

23 THE COURT: Other counsel for defendants wish to
24 chime in?

25 Mr. Cordell.

1 MR. CORDELL: I will just add to that, Your Honor,
2 we have had good discussions. Judge Faulkner has been a lot
3 of help, and we remain hopeful. I can't promise anything.

4 MR. CORNELIUS: Your Honor, on behalf of my clients
5 we have had similar experience. We are working well and
6 making progress.

7 THE COURT: Good. Okay. Anyone else? Let me just
8 inquire first of the defendants, do you believe that you have
9 the parties there from CSIRO which you need in order for
10 mediation to be meaningful? In other words, do you feel like
11 you have the decision-makers available to you? And then I am
12 going to ask the same question of plaintiff, but I will go to
13 defendants first.

14 MR. VAN NEST: Based on what mediation experience we
15 have had, the answer is, yes, Your Honor. I think they have
16 brought people here that can make decisions. As you know,
17 they have reached a couple of mediation settlements.

18 THE COURT: Okay. Very good.

19 MR. FURNISS: Only in some cases, Your Honor, have
20 decision-makers been present. Again, without going into
21 names, there have been a number of parties who have not sent
22 people that appear to have any authority whatsoever other than
23 Counsel. But Judge Faulkner is aware of that. Mr. Van Nest
24 is right, the decision-maker from CSIRO was in California to
25 meet with Judge Faulkner on Monday. I think it is his third

1 trip, and he will be here whenever Judge Faulkner asks him to
2 to be here.

3 THE COURT: He is coming from Australia, right?

4 MR. FURNISS: Right. He has come three times to
5 participate --

6 THE COURT: I have made that flight. It is not an
7 easy one.

8 MR. FURNISS: It is a long way.

9 THE COURT: I would encourage him to be present and
10 available at Judge Faulkner's request. I would also say --
11 again, I don't know who the parties are that Mr. Furniss feels
12 like that have, perhaps, not had decision-makers; but in order
13 for there to be good-faith negotiations on both sides, you all
14 know that needs to happen.

15 So, Mr. Furniss, I will ask you to communicate to
16 Judge Faulkner who you believe those parties are. And I am
17 going to be asking Judge Faulkner to contact those defendants
18 and get the people there -- I mean, y'all can look at the
19 amount of money and time and resources that is being put into
20 this. And it is just unacceptable for there not to be
21 decision-makers with authority there. And it doesn't sound
22 like that is the main players in the case; but, perhaps, some
23 of the other defendants. I don't know who those are. But
24 let's be sure we get the right people at the table.
25 Then y'all keep working on it. I would encourage you -- I

1 mean this case is going to be extremely difficult to try. It
2 is going to be very long. It has already gone on for many
3 years. We have been to the Fed Circuit once. We will
4 undoubtedly go back again if we try it, from one side or the
5 other. And you all know what -- should know by now what your
6 risks are, be able to advise your client, and whether you are
7 willing to take those risks or not. Be reasonable. Try to
8 compromise. There is nothing that ends the litigation like a
9 settlement. The ones that don't settle, they just go on and
10 on and on and somebody gets hurt. I don't know who that will
11 be.

12 While you have got control over your own destiny, I
13 just encourage you to work at it the next couple of weeks
14 because we are going to be picking a jury, we are going to be
15 trying this case, and we are going to get a verdict. So, you
16 know, and once that happens it is a whole new ballgame.

17 So with that let's talk now about the trial
18 structure. And I want to take up first defendants' motion to
19 modify the trial structure, which in Case No. 324 is Docket
20 No. 350, 549 is 512, in 550 it is 584, and in 551 it is 465.
21 Who would like to be heard on that? Mr. Van Nest?

22 MR. VAN NEST: I would, Your Honor. Speaking this
23 morning not only for Intel, but all of the Defense Group in
24 those list of cases. We have proposed a plan that has really
25 three goals. As you just said, this is going to be a

1 difficult, lengthy trial. We are trying to take advantage of
2 the fact that Your Honor has bifurcated it to focus the Phase
3 I trial on the truly common issues of infringement and
4 invalidity without overburdening the jury with a lot of
5 individualized defendant decisions. And at the same time we
6 recognize while there may be some overlap no matter what we
7 do, we want to try to minimize presenting duplicative,
8 overlapping evidence.

9 And really the third goal is to alleviate some
10 evidence problems that arise from having Buffalo consolidated
11 with our case and having the damages bifurcated out. So let
12 me focus on two issues. I think reading the parties'
13 positions on trial structure, there really are only two
14 issues. One is how and when to try the RAND defenses, Phase I
15 or Phase II. And second is how and when to try willfulness,
16 Phase I or Phase II. Let me talk about RAND first because we
17 have quite a bit of agreement on RAND.

18 Both parties agree that the RAND defenses should not
19 be presented to the jury in Phase I. CSIRO's position is that
20 it is an equitable issue. It is a Court decision. It is a
21 bench trial. And presenting evidence of RAND to the jury in
22 Phase I would be confusing because it doesn't have anything to
23 do with the rest of Phase I.

24 THE COURT: Do you agree with that?

25 MR. VAN NEST: I do.

1 THE COURT: Are you speaking on behalf of all
2 defendants?

3 MR. VAN NEST: Yes. With respect to our position,
4 our position is that it is an equitable issue, it is tried to
5 the Court, it has no part in Phase I because it is unrelated
6 to Phase I. But it should be tried as part of Phase II. And
7 the reason for that, Your Honor, is that there is almost a
8 complete overlap of evidence.

9 Our RAND theory, as Your Honor knows, is essentially
10 that if CSIRO made a commitment back when the IEEE was
11 considering the standard to license at a reasonable
12 nondiscriminatory rate. At that time they had a license at
13 pennies on the chip with Radiata. They renewed that license a
14 couple of times after that at pennies on the chip. And now
15 that we come to our case they are demanding four dollars, five
16 dollars and in some cases nine dollars a chip.

17 And our position is under RAND that that is a
18 violation of their commitment. It is not reasonable. It is
19 discriminatory. That is really the same issue that the jury
20 is going to have to grapple with on damages. What is a
21 reasonable royalty? Is nine dollars reasonable? Is five
22 dollars reasonable? Is fifteen cents reasonable? And the
23 experts recognize this overlap. All of the experts that are
24 applying the Georgia-Pacific analysis, whether you talk about
25 the hypothetical negotiation or you talk about a licensing

1 practice or history or you talk about established rates as a
2 result of these several different licenses, all of these are
3 factors in the Georgia-Pacific analysis.

4 So the way we look at it, if the choice is between
5 having a separate bench trial after Phase I or as part of
6 Phase I and trying it as part of Phase II, there is no reason
7 to have a separate trial to the bench. All of the same
8 evidence is going to be presented. And what we are proposing
9 is simply in the Phase II trials since the evidence is the
10 same, Your Honor would hear along with the jury -- the jury
11 could issue an advisory verdict if Your Honor found that was
12 helpful. The jury, in any event, will be deliberating over
13 many of these related issues as part of its job in determining
14 damages.

15 So, again, I think both parties are agreed it
16 shouldn't be a jury presentation in Phase I. The disagreement
17 is about how and when to try it, and I think our proposal,
18 frankly, saves a lot of time and energy. We don't have to
19 have a separate bench trial on it. We could try it as part of
20 Phase II.

21 THE COURT: In your proposal and if it went to Phase
22 II along with the damage trial, would it be presented to the
23 jury, the RAND defenses and testimony and arguments?

24 MR. VAN NEST: They would, Your Honor, but only to
25 this extent: If it went to Phase II what we have said is to

1 streamline it and simplify it, we would present the RAND
2 defense only as a limitation on damages not an absolute bar.
3 So, in other words, the defenses of unclean hands and
4 equitable estoppel that are complete defenses we would
5 withdraw those in favor of trying the RAND defense as a
6 limitation, so the evidence would be presented and we would
7 ask Your Honor to seek an advisory verdict from the jury on
8 the RAND limitation issue. But the ultimate decision on RAND
9 would be made by Your Honor, by the Court.

10 THE COURT: But you are saying you would withdraw
11 your equitable defenses if the RAND issue goes to the damage
12 trial?

13 MR. VAN NEST: That's right, Your Honor, except
14 for --

15 THE COURT: What would there be left to present to
16 the jury if you withdraw your defenses?

17 MR. VAN NEST: We would not withdraw all RAND
18 defenses, but the only RAND equitable defense we would present
19 is that the RAND obligation places a limit on the damages. So
20 that would be an equitable defense that could be presented to
21 the jury for an advisory verdict followed by a verdict from
22 the Court. Obviously, the jury is going --

23 THE COURT: I don't normally submit equitable issues
24 to the jury for an advisory opinion. Why should I do it in
25 that case?

1 MR. VAN NEST: I don't think it costs you anything,
2 Your Honor, because the evidence is all going to be the same
3 anyway. The RAND evidence goes to what commitments they made,
4 what licenses they had, what their licensing practice was.
5 Those are all items of evidence that the jury will be hearing
6 in Phase II anyway on the question of what is the reasonable
7 royalty? So the reason to do it is simply that it doesn't
8 cost us anything. We have all that evidence before the jury.
9 Your Honor will have to make the ultimate call on it. It is
10 not going to be a defense that bars damages.

11 THE COURT: Wait a minute. I will have to make the
12 ultimate call on what, if you are withdrawing all of your
13 equitable defenses? What would there be left for me to
14 decide?

15 MR. VAN NEST: We are not withdrawing all equitable
16 defenses, Your Honor. We have a RAND affirmative defense that
17 says that based on the commitment they made, they are not
18 entitled to damages beyond what was already in place back in
19 1998, 1999.

20 THE COURT: Is that a legal or equitable defense?

21 MR. VAN NEST: We think that is an equitable
22 defense, Your Honor. But obviously the facts that address
23 that defense also go to the damages issue, which is a legal
24 issue. So I guess better put, we are withdrawing a form of
25 relief rather than withdrawing all of the equitable defenses.

1 As I said we still have a RAND defense, but we are not seeking
2 to bar damages. We would be seeking only to limit them to
3 what was in place and reasonable at the time the commitment
4 was made.

5 THE COURT: So you would be wanting me to decide
6 that as a matter of equity but at the same time wanting the
7 jury to decide it from a legal standpoint.

8 MR. VAN NEST: What the jury would decide, Your
9 Honor, as any jury would, is what is a reasonable royalty
10 based on all of the Georgia-Pacific factors.

11 THE COURT: They are going to be deciding that
12 anyway, right?

13 MR. VAN NEST: They are going to be deciding that
14 anyway. What Your Honor would be deciding is whether or not,
15 apart from what the jury decides, there is a limit on damages
16 based on the RAND commitment. That is what the affirmative
17 defense would be. It is a defense that they are not entitled,
18 they have given up the right, they are equitably estopped from
19 claiming damages --

20 THE COURT: Well, now wait a minute. You are going
21 back into equitable estoppel. I thought you were waiving that
22 one.

23 MR. VAN NEST: We are waiving the form of relief,
24 Your Honor, that says they are equitably estopped from any
25 damages. We are not waiving the defense itself. The defense

1 would be limited to they are estopped from claiming damages
2 above what was in place at the time they made the commitment.
3 So it is a limitation on damages, not an absolute bar. So the
4 way it would work is the jury would reach a verdict on what is
5 reasonable; and if what they awarded was consistent with the
6 Radiata license, there would probably be nothing for Your
7 Honor to do. It is only if the jury awards a damage amount
8 that is far in excess of what CSIRO had been licensing the
9 patent for back in '98 and '99 with Radiata. Then Your Honor
10 would have the decision are they equitably estopped from
11 claiming damages above a certain level? In other words, is
12 this so inconsistent with their RAND commitment that it has to
13 be reduced?

14 THE COURT: Thank you.

15 Response?

16 MR. CAPSHAW: Your Honor, what is really happening
17 here is the defendants want to get in such issues in front of
18 the jury in an advisory way as, did CSIRO mislead the
19 defendants? If you look at some of their advisory jury
20 questions, that one of them is, "Was CSIRO's commitment in
21 1998 to license the '069 patent at a reasonable and
22 nondiscriminatory rate and/or its subsequent communications
23 and conduct misleading?" And they want other questions like,
24 "Was CSIRO's conduct unconscionable?" Those are the advisory
25 kind of questions they want to ask to the jury. This is an

1 equitable defense, if it is a defense at all. The RAND issue
2 is very confusing to a jury because --

3 THE COURT: It is a bit confusing to me, too.

4 MR. CAPSHAW: As I heard it explained, I was
5 confused because the RAND letter that CSIRO sent -- let's
6 start with this -- was for 802.11a. Most of the products in
7 this case are 802.11g, and CSIRO expressly refused to send
8 such a letter because they saw how the defendants want to used
9 the first RAND letter in the 802.11a. And so there is a big
10 dispute among the experts whether a RAND letter on the 802.11a
11 can somehow act as a limit on Georgia-Pacific. And they don't
12 cite a case that says that is a recognized legal theory.

13 They have an equitable theory, and that should be to
14 the Court. It is going to confuse the jury if they present
15 these kinds of defenses, would the 802.11a letter somehow bind
16 or limit our reasonable royalty under Georgia-Pacific? That
17 will be confusing.

18 We think it is an equitable defense, and it ought to
19 remain with the Court. You can hear that. You can decide
20 does the 802.11a letter somehow transmogrify onto the 802.11g
21 and make it somehow CSIRO bound forevermore to an 802.11
22 reasonable standard rather than Georgia-Pacific? You can
23 decide that issue.

24 We will also have four advisory jury trials on this
25 RAND equitable issue. So we don't think the Court ought to

1 move it. We think it is an equitable issue. You can decide
2 it. And we have a strong disagreement about how much evidence
3 on RAND ever gets to the jury. So for that reason --

4 THE COURT: That is what I wanted to ask you to
5 respond to was Mr. Van Nest's argument that much of the
6 evidence that I would be hearing on the equitable defenses
7 related to RAND would have to be replayed under
8 Georgia-Pacific to the -- during the Phase II damage part.

9 MR. CAPSHAW: Your Honor, I think very little. I
10 think you are going to have to decide as far as the 802.11a
11 letter. As a matter of contract law, does a commitment to
12 offer a reasonable and nondiscriminatory royalty to whoever
13 asks you for one, is that some kind of legal commitment that
14 sets some kind of rate at pennies? Do you take extrinsic
15 evidence? How do you interpret the reasonable part in the
16 802.11a letter?

17 THE COURT: There is not much authority on this
18 question, is there?

19 MR. CAPSHAW; We could find no authority that there
20 somehow is a binding amount in a RAND letter. In fact, if you
21 look at the motion for summary judgment, the IEEE says that
22 "reasonable" is meaningless. And they don't try to set an
23 amount because it differs from party to party and patent to
24 patent. So we think that these are legal issues and contract
25 construction issues that you are going to decide. And if you

1 look at the motion for summary judgment -- well, you probably
2 already have, you will see all of the disputes about whether
3 extrinsic evidence comes in to interpret that 802.11a letter.
4 Can it even apply to an 802.11g standard? When CSIRO was
5 asked to send in a RAND letter on 802.11g we refused. So what
6 is all the legal construction of those contracts? We don't
7 think that comes in at all in the Georgia-Pacific and don't
8 see how it could. It goes back to the equitable nature of
9 this dispute.

10 THE COURT: Thank you.

11 Response?

12 MR. VAN NEST: Your Honor, just one fact point
13 without getting too deeply into it. Every single defendant in
14 this room was told in writing by CSIRO that they had made a
15 commitment to license at RAND on the "g" standard. Everyone
16 received the letter except, perhaps, Intel. All of the
17 customers by CSIRO were told we have made a commitment to
18 license at reasonable nondiscriminatory rates on "g" and we
19 want you to pay based on your "g" products. One thing I
20 didn't hear Mr. Capshaw say is there isn't a lot of overlap.

21 Obviously, under Georgia-Pacific the experts are
22 looking at what would the hypothetical negotiation have
23 produced? If at the time of that negotiation CSIRO had made a
24 commitment to the whole group to license at a reasonable
25 nondiscriminatory rate, obviously that is something -- that is

1 just a fact that we have to live with it --

2 THE COURT: Are there a lot of legal issues, though,
3 tied up in interpreting what this RAND defense is and how it
4 applies? Or has this been done and this is black letter law
5 and everybody knows what it means and there are cases that you
6 can cite me to?

7 MR. VAN NEST: I don't think it is black letter law,
8 Your Honor.

9 THE COURT: My review of it is this is sort of a
10 case of first impression dealing with the RAND defenses.

11 MR. VAN NEST: I think that is a fair point. There
12 are obviously cases that talk commitment and enforcing it in
13 various contexts, and we have cited those to Your Honor. But
14 fundamentally it is a question of did they make the
15 commitment? What was the nature of it? And have they lived
16 up to it? Those are intensely fact questions.

17 The only sort of contract interpretation issue is,
18 you know, what is the word "reasonable"? What does the word
19 "nondiscriminatory" mean? But that is really no different
20 than any other sort of contract or promissory estoppel case.
21 It is very fact-bound. And, again, all of this goes to this
22 hypothetical negotiation anyway.

23 So our point is very simple, if the two choices are
24 have a separate stand-alone bench trial where we review all of
25 this evidence in front of Your Honor only? Or try it as part

1 of the damages trials, which we already have set up and
2 already have going and will already include all of this
3 evidence? Obviously, it makes more sense to do the latter.
4 And Your Honor can control what verdict questions we ask for,
5 if any.

6 Obviously, we are at a very preliminary stage and
7 that would require a little more refinement, but certainly in
8 terms of saving ourselves time and effort and money, it is
9 better to try that issue in trials where we already have to
10 hear all of the evidence anyway.

11 If Your Honor finds that an advisory verdict doesn't
12 help you, so be it.

13 THE COURT: Well, I think this is -- let me ask you
14 this one final question: If I go ahead and hear the equitable
15 RAND defenses as part of this trial as originally planned, and
16 if you prevailed on one of those defenses, then it would not
17 be necessary to even have the damage trials, would it?

18 MR. VAN NEST: Well, I guess that is right, Your
19 Honor, because in that instance we are asserting the RAND
20 defense as an affirmative defense that bars damages, and that
21 is right. If you ruled in an equitable bench trial as part of
22 Phase I that they were equitably estopped from seeking damages
23 based on what they have done vis-a-vis RAND, that's right,
24 that obviates the damage trials.

25 THE COURT: Or if I ruled as a matter of law that it

1 set a limitation on what a reasonable royalty would be, that
2 too would negate the need for a second trial, would it not?
3 Or would you still have issues to litigate?

4 MR. VAN NEST: I think that would depend on the
5 cap. I mean, if you set a cap then the jury would presumably
6 still have to decide where within that cap the damages fell.
7 Obviously, if you set a cap it gives a lot of us guidance on
8 how we might resolve the case. But I'm not sure it would
9 obviate the Phase II trials. It would set a limit on what the
10 juries in those trials could award, but they would still have
11 to be a determination of what is a reasonable royalty within
12 the cap.

13 So, again, I think everyone is in agreement we are
14 not going to present it to the jury in Phase I. What we need
15 to know from Your Honor is how and when you want to do it.

16 THE COURT: All right. I believe I will stick with
17 the original plan, and we will go ahead and hear it as part of
18 this case. And so defendants' motion to modify is denied.

19 MR. VAN NEST: Your Honor, just one point of
20 clarification. So when that evidence will be presented to
21 Your Honor outside the presence of the jury, would we be able
22 to have some hiatus between the jury trial and that bench
23 trial so that we know what we are doing in terms of planning?

24 THE COURT: Well, that leads right into my next
25 question, and that is your trial estimates. You are

1 estimating 31.5 hours. Does that include your inequitable
2 conduct evidence as well?

3 MR. VAN NEST: No, it doesn't, Your Honor.

4 THE COURT: It doesn't?

5 MR. VAN NEST: It does not. There is a second issue
6 that we presented in our trial structure motion. That has to
7 do with willfulness. Willfulness is a separate issue that, if
8 Your Honor please, I would like to address briefly now?

9 THE COURT: All right.

10 MR. VAN NEST: There is really two reasons to try
11 willfulness as part of Phase II. One is to avoid the need in
12 Phase I to get 12 separate determinations, individual findings
13 on willfulness. As we are set up now with 12 defendants
14 remaining, the jury has to deliberate 12 separate willfulness
15 verdicts based on individual factors for each defendant. And
16 the second reason is to avoid this evidentiary problem that
17 arises from Buffalo.

18 Let me address each of these issues. Under Seagate
19 there are two things the plaintiff has to prove on
20 willfulness. First, they have to prove that it would have
21 been objectively reckless to proceed. That is a common issue
22 that is based on our liability defenses, and we recognize that
23 is common really to all defendants. But even if they prove
24 that, they have to prove a knowledge element. They have to
25 prove that it was either known or so obvious it should have

1 been known to each individual defendant that it was
2 objectively reckless to proceed. And that gets into the
3 knowledge of each individual defendant and would require proof
4 in the case of each of the 12 of what their companies knew,
5 how they proceeded, what decisions they made, why they
6 produced a product? Whether they knew a patent or didn't know
7 of it? What demands have been made on them by CSIRO? And
8 some of us no demands had been made and so on.

9 So that individual issue, we think, is much more
10 efficiently tried in Phase II when we are looking at smaller
11 groups of defendants anyway. Now, we have these four trials
12 set up with three and four defendants each.

13 THE COURT: Under Seagate and the Seventh Amendment
14 doesn't it require it be tried with the liability phase of
15 case?

16 MR. VAN NEST: Well, we argued that the Seventh
17 Amendment prevented splitting all of this, Your Honor; and
18 Your Honor has decided to split it up. And so we recognize
19 that we have a split trial and we are willing under that
20 structure to try the willfulness in Phase II. I don't think
21 it is required to be tried in Phase I if we have bifurcated
22 liability and damages now.

23 It makes a lot more sense for a second reason is
24 that the Buffalo Federal Circuit opinion on validity is
25 something the defendants have a right to rely on. It goes to

1 objective recklessness. The Federal Circuit, as Your Honor
2 knows, has said that the question of obviousness is a close
3 one that should be tried to a jury. There are disputed
4 questions of fact on both sides of that. We would like to put
5 that in in a willfulness trial.

6 On the other hand, the infringement findings by the
7 Federal Circuit are not binding on any defendant here other
8 than Buffalo. What CSIRO is arguing if we get to put in the
9 validity determinations by the Federal Circuit, they want to
10 put in the infringement determination. Well, that would be
11 highly prejudicial to the defendants other than Buffalo,
12 perhaps, who are not bound by that determination, who didn't
13 create that record, who are presenting an entirely different
14 set of facts to this jury as you will hear shortly, I think.

15 So that problem is solved by moving the willfulness
16 determinations to Phase II where, as I said, Your Honor will
17 have smaller groups of defendants trying their damages cases
18 separately where this issue can be more efficiently tried as
19 part of that case than it can in the first case. Our
20 estimate, Your Honor, was based on having not to try the
21 equitable defenses to the jury because we understood that was
22 agreed between the parties. But it is made with the
23 understanding that we would have to try willfulness. That is
24 what the estimate was based on, that willfulness would be part
25 of Phase I.

1 THE COURT: It was my understanding when I asked for
2 the time estimates I thought I already entered an order that
3 said that the RAND defenses would be tried as part of this
4 trial.

5 MR. VAN NEST: You had, Your Honor. But the
6 parties, as we worked through the pretrial, both came to the
7 agreement that the RAND issues wouldn't be tried to that first
8 jury; that they would be subject to an equitable bench trial
9 either as part of Phase I or as part of Phase II.

10 THE COURT: Is that plaintiffs' understanding?

11 MR. FURNISS: Your Honor, it has always been our
12 position that was a legal issue for the Court on the RAND.

13 THE COURT: Do your trial times include the RAND
14 issues as well?

15 MR. FURNISS: Yes, Your Honor. As we think it is a
16 legal question that wouldn't take up -- it is fully briefed on
17 the motion for summary judgment. Your Honor, we believe that
18 "reasonable" means reasonable. The only way they can make
19 their RAND claim is they had an expert that testified that it
20 was a standard of usage in the trade; that reasonable and RAND
21 really meant very, very low or zero. Now, that testimony
22 is -- in the IEEE there is absolutely no support for it. So I
23 think, frankly, that you can resolve the RAND issue on the
24 summary judgment this morning, Your Honor. I am prepared to
25 address that in detail.

1 This argument that "reasonable" -- discriminatory
2 may be enforceable in the sense of treating similar parties
3 similarly, but "reasonable" means reasonable. It is exactly
4 the same word that is in the standard. 235 says a plaintiff
5 is entitled to no less than a reasonable royalty. So it does
6 include that, and we think it is going to take -- Your Honor
7 reads the briefs. It is a pure legal issue. When they say it
8 is a factual issue, there is no question there is no RAND
9 letter on 802.11g. There is no question but that "reasonable"
10 means reasonable. The IEEE itself takes no position.

11 So it is the exact same standard that is going to be
12 presented to the jury on a reasonable royalty. So there is no
13 difference whatsoever. So our estimate does include it
14 because it is purely a legal issue for the Court and, frankly,
15 it is mostly the time of yourself and your staff to read the
16 issue because we think it is quite clear --

17 THE COURT: What is your response on the
18 willfulness?

19 MR. CAPSHAW: I will do that, Your Honor. I think
20 it is important -- let me start with Buffalo first because I
21 think the defendants confuse what the Court of Appeals did in
22 Buffalo. Buffalo was a summary judgment appeal. The Court of
23 Appeals said two things: One, that in light of KSR, which
24 came out after you decided, your summary judgment analysis was
25 flawed. And so they reanalyzed the case in light of KSR and

1 sent it back to you.

2 The second thing they did is all they found is that
3 there was a genuine issue of disputed fact on the obviousness
4 question and sent it back for trial. Now, you think about
5 what the defendants want to do with the Buffalo opinion. What
6 they are really saying is if any infringement case or validity
7 case ever goes to the jury, you can't get willfulness, and we
8 know that is not the law. So I think they read too much into
9 the Buffalo opinion. Neither side should be using the Buffalo
10 opinion, either the statements of this Court in the summary
11 judgment or the Court of Appeals decision. Neither party can
12 rely on it. It is just a reversal of a summary judgment
13 finding a disputed issue of fact.

14 Let me go back to willfulness. And you asked a
15 question about the Seventh Amendment. I think the Court is
16 exactly right. After Seagate, courts have been reluctant to
17 split up infringement from willfulness because the issues
18 overlap. Now, the issue of damages and infringement are
19 different issues, and those issues don't overlap. They do
20 have some of the common elements. But if you look at some of
21 the court decisions that have come out, that issue of can you
22 split willfulness after Seagate in light of the Seventh
23 Amendment, has come up and been analyzed.

24 So let's look at the overlap. On willfulness under
25 the new objective standard some of the questions are going to

1 be common. Was there a substantial noninfringement case? The
2 jury has to hear the infringement case. They have to hear the
3 validity case. Was there copying? Copying is a secondary
4 consideration of non-obviousness. So these objective criteria
5 in Seagate all have to be evaluated in light of infringement
6 and the invalidity case in front of the Court -- in front of
7 the jury. You can't split those up. Too much proof
8 overlaps. So I think that moving the willfulness, it won't
9 work. You can't split it off from infringement and validity.
10 The jury is going to have to hear the same invention story,
11 the same kind of infringement evidence, they will have to hear
12 copying evidence all over again if you take willfulness out of
13 the case.

14 So two things, I don't think there is an evidentiary
15 quagmire. It is one of the defendants' own making. Nobody
16 should be using Buffalo. We don't think they ought to be able
17 to cherry-pick good pieces out of the opinions of the Court or
18 Court of Appeals and not have to hear the bad side, too; but
19 you cannot split willfulness. And I think the Court has it
20 exactly right. There is a Seventh Amendment problem with
21 splitting common-issue defenses.

22 THE COURT: Okay. Final word.

23 MR. VAN NEST: Your Honor, again, we have a lot to
24 accomplish in Phase I now. As Your Honor knows, we are trying
25 infringement, direct and indirect; we are trying validity; we

1 will have several anticipation references; several obviousness
2 combinations. To ask a jury in addition to that to make 12
3 individual determinations of willfulness in a two- or
4 three-week trial is putting an enormous burden on people in
5 terms of getting something done.

6 As a matter of fact, most of the willfulness
7 evidence overlaps more closely with the damages case. In the
8 damages case they are going to have to show that their patent
9 added something to the prior art; was significantly better
10 than the prior art; that the success of products was based on
11 the patented invention; all of the things that are also
12 relevant to validity, be it anticipation or obviousness.

13 So there is going to be some overlap however we try
14 this. There is going to be overlap whether we try it -- the
15 only trial structure in which there is no overlap is the one
16 we proposed in December; that is, we try everything together.
17 But we are not there now. We have bifurcated. So the real
18 question is what is the most efficient way to get verdicts
19 from the jury that are meaningful and based on careful
20 deliberation.

21 And what we are saying is that, given the complexity
22 of Phase I already and given our right to rely on the Buffalo
23 validity opinion, which says there is substantial questions
24 about validity based on what was presented in the prior art,
25 that really can't be done effectively in Phase I. It has got

1 to be done in Phase II. So we think that is a more
2 appropriate way to proceed.

3 THE COURT: All right. Thank you. I am going to
4 stick by my earlier ruling that everybody has been operating
5 up until this motion was filed, and we are going to try all of
6 the liability issues, including willfulness and inequitable
7 conduct in the trial that we are about to begin; and that will
8 leave us with only damages to be tried in the four subsequent
9 trials breaking the defendants up based on damages.

10 MR. VAN NEST: And, Your Honor, excuse me. Then
11 what does that mean with respect to RAND, for example, and the
12 inequitable conduct, those will be tried to Your Honor as part
13 of Phase I separate --

14 THE COURT: Just as I always do, all inequitable
15 conduct defenses I will hear whatever testimony that comes in
16 in front of the jury that might relate to those. During the
17 trial in the evenings or following this trial, I will continue
18 on and hear whatever evidence there is regarding inequitable
19 conduct.

20 MR. VAN NEST: Fair enough.

21 THE COURT: I want to come out of this with
22 everything I need to decide all of the liability issues, and
23 then we will move to damages in June.

24 MR. VAN NEST: Fair enough.

25 THE COURT: All right. Let's go next to -- I think

1 this could affect the trial -- well, I guess not. Let's go on
2 and talk about trial times. I have your proposed trial
3 times. I think both sides are fairly within the ballpark on
4 voir dire. It ranges from 45 minutes to 60 minutes. I think
5 that is fair; somewhere in there for a case of this size. I
6 think Buffalo is asking for ten. I don't think that is
7 unreasonable. Anyway, I will get within those ranges and give
8 you something fairly close to that for voir dire.

9 Opening, again, I think is fairly reasonable. Both
10 sides are saying 60 minutes, and Buffalo is asking for ten. I
11 may tweak that a little bit in my order, but it will be
12 something fairly close to that. But where the wheels come off
13 on this thing is CSIRO is asking for 18 hours for direct and
14 cross-examination, and the defendant is asking for
15 31-and-a-half, and Buffalo is asking for two.

16 Again, closing argument is fairly close; 60 minutes,
17 90 minutes, and ten minutes. And somewhere in that ballpark I
18 think we will satisfy everybody.

19 But we have a big disagreement on direct and
20 cross-examination, and I guess I would like to hear some
21 argument on that.

22 MR. FURNISS: Yes, Your Honor. There is one patent,
23 and there is standardized products that all operate
24 essentially in exactly the same way. So even though you have
25 a lot of defendants, there are simply common defenses. The

1 infringement defenses consists of three, two of which I think
2 are nothing more than rearguing the claim construction. And
3 there is motions directed to that. And the products all
4 operate in the same way.

5 So the number of parties is not indicative of the
6 number of individual issues, and I think it is fair to say
7 that all -- they filed common expert reports, and they all
8 raise exactly the same arguments on the TCM encoder, and so we
9 believe that the amount of time allotted is more than
10 sufficient, and we intend to move briskly through our case.
11 And I think the defendants' plan is to put on a lot of issues
12 that are not really relevant, and I don't think we need that
13 much time.

14 So I think the best case I ever put on was when a
15 judge at the ITC gave my partner and I eight hours to put on
16 our infringement defense. I have to say at the time we were
17 horrified; but it ended up being the best, most focused
18 analysis I have ever done. She did me a big favor by that --

19 THE COURT: Well, that has been my experience, and I
20 think there are a lot of lawyers in this room that have voiced
21 that to me that at the time they thought a limitation was
22 burdensome, but it really made them focus. And I will just
23 say, you know, you can win a case in, you know, nine or ten
24 hours or maybe twelve per side with a jury; but you can sure
25 lose a case with 20 or 25 hours when you start going over to

1 that time with the jury so -- on both sides. And I have seen
2 it happen.

3 So anyway let me hear from defendants.

4 MR. VAN NEST: Could I respond? Let me just say
5 that we have done, I think, an outstanding job on our side of
6 the table trying to coordinate our defenses.

7 THE COURT: I think you have too. You should be
8 commended for that.

9 MR. VAN NEST: We have presented, you know, minimal
10 overlap, we have spoken with one voice; and we intend to do
11 that during the trial. However, there is a lot of ground to
12 cover. Let me explain why that is so.

13 We have direct infringement against various of the
14 defendants. We have indirect infringement inducement against
15 various other of the defendants. We have very complicated
16 technology that has to be explained carefully to the jury and
17 make sure that everybody is on the same page and aware of it
18 and understands it.

19 We have a variety of different products, and we
20 couldn't, unfortunately, have one expert cover all of them
21 because many of us are competitors. We have separate experts
22 that will not overlap, but they are going to be talking about
23 each of the defendants' products. We are going to keep that
24 to a minimum, but it is necessary to do simply because one
25 expert couldn't look at everybody's products.

1 Now, more than that, the other big part of evidence
2 in this case is going to be on the secondary considerations of
3 non-obviousness. The commercial history of this patent and
4 the IEEE standard and how products were created under that, is
5 important because CSIRO is claiming that their patent has
6 created the wireless revolution. We are entitled to show that
7 the commercial success that we have enjoyed has nothing to do
8 with their patent, but it has to do with an open standard that
9 we created that we built products based on that CSIRO had
10 nothing to do with; and that the success we have enjoyed is
11 based on how our products work and what they do and not on the
12 '069 patent.

13 That is going to take some time to develop because
14 there is a long history here. Wireless LAN didn't start with
15 the CSIRO patent. Wireless LAN started in the late '80s,
16 early '90s and people had them out there. And with twelve
17 different defendants there is a history to tell. And on top
18 of that, Your Honor, if we do have to try willfulness as part
19 of Phase I, which Your Honor has ordered we do, each defendant
20 has got to have some time -- and I am hearing it now from my
21 colleagues already -- each defendant has a right to explain to
22 the jury why their company went ahead and made products under
23 these circumstances.

24 I mean, they have to prove CSIRO does -- that it was
25 known or so obvious it should have been known to each

1 individual defendant that it was objectively reckless to
2 proceed to build these products. And I am going to be hit
3 with requests which are legitimate from each of the defendants
4 sitting in this room that they get some time to put their
5 people on and explain what they did and why. So I also agree
6 that being short is good, and being expeditious is good and I
7 have tried plenty of cases in the ITC. And I have tried real
8 hard to narrow this down.

9 Thirty-one hours is essentially five trial days, and
10 I think that is the minimum, absolute minimum that we are
11 going to need to try all of these things that you are asking
12 us to try in Phase I, which includes not only infringement but
13 validity but RAND and willfulness. That is going to be a
14 really tall order. And I think to try it -- to give us less
15 than five trial days to present our evidence -- that is what
16 this 31 hours represents -- is going to make it almost
17 impossible to present the jury with the full story of what
18 happened and the full story of what happened for each of the
19 three defendants sitting in this room.

20 MR. FURNISS: Your Honor, on commercial success they
21 are all using exactly -- that there is just two witnesses for
22 all of these defendants that are going to talk about that
23 issue. And that in terms of willfulness is going to come in
24 as part of the noninfringement defense. It is the same
25 evidence. So when they present their noninfringement defense,

1 that is the basis of the allegation there is not a willfulness
2 conduct.

3 Moreover, the products on all of the defendants have
4 said that they relied upon the IEEE. So they are saying that
5 they had knowledge of and they all had knowledge of this
6 before infringement began. So I think it can be done in less
7 than 31-and-a-half hours. But as I said, there is one patent
8 and a common defense, so -- on everything.

9 THE COURT: Okay. Let me do this: I would like a
10 little more detail from both sides as to how you intend to use
11 your time on direct examination. I am not so concerned about
12 cross because, you know, if you take more than half the time
13 that the other side took on direct on cross, you are probably
14 losing ground with the jury in most cases. But I would like
15 to see your estimates. And what I would like from each side
16 and I would like this filed by noon on Tuesday is break your
17 witnesses down by infringement, invalidity, and willfulness.
18 If you -- or infringement, willfulness, and then invalidity.
19 In the willfulness if you have witnesses that you are going to
20 need to call that you are not calling as part of your
21 infringement case, and then list -- so we have got
22 infringement, willfulness, invalidity, and then equitable
23 defenses; those four categories.

24 Then within each of those categories give the name
25 of the witness, identify who they are, they are a RAND expert

1 or they are a willfulness witness or background witness or
2 whatever they are; and then just a very brief summary, a
3 couple of sentences of what their testimony will cover. I
4 only want "A" witnesses. I don't want the "may call" and just
5 listing, but I am talking about who you are going to be
6 putting on in your cases. I would like to have that by
7 Tuesday. And I would encourage both sides to spend some time
8 thinking about that, and then I will enter an order hopefully
9 next week giving you your trial times for the case.

10 MR. VAN NEST: That makes a lot of sense, Your
11 Honor, thank you.

12 THE COURT: Okay. Thank you.

13 All right. With regard to the juror questionnaire,
14 I have reviewed it. I am not opposed to it. It will be
15 filled out the morning of trial. And I do want you to make a
16 couple of modifications to it. One, in addition to the juror
17 name have a slot for the juror number. In Question No. 9 when
18 it asks have you ever been accused or convicted of a crime,
19 strike "accused of." And then there is no need for a
20 declaration of perjury on the end. Just a place for them to
21 sign. And I would like that reduced to one page front. So
22 get your typesetters to shrink it down where we can get it on
23 one page in smaller print, blocks. Maybe get together, meet
24 and exclude some questions or shorten some questions. But get
25 it down to just one page front only. That is what they will

1 fill out. And get that to me by -- when could you have that
2 to me you think?

3 MR. VAN NEST: Probably Monday.

4 THE COURT: Monday.

5 MR. FURNISS: Yes, Your Honor.

6 THE COURT: Have that to me by, say, 5:00 o'clock
7 Monday will be fine.

8 MR. FURNISS: Yes.

9 THE COURT: And get that to me. We will get that
10 filled out when the panel is seated, and we will make one copy
11 available to each side. Now, I know you have all got multiple
12 lawyers and multiple parties. But it is going to be your
13 responsibility then to get copies made for whoever you want to
14 get them made for.

15 MR. VAN NEST: Your Honor, we will receive that on
16 the 6th; is that the idea? They will come in -- the venire
17 will come in that morning and fill it out?

18 THE COURT: Right.

19 MR. VAN NEST: Then could we have some time to
20 digest those? We will need to copy them and make sure
21 everybody in our group has a chance to look at them.

22 THE COURT: You will have some time, but I think
23 most of your time will be you will have somebody looking at
24 them while the other side is doing voir dire.

25 MR. VAN NEST: Okay.

1 THE COURT: Okay.

2 MR. VAN NEST: We would appreciate anything Your
3 Honor can give us there.

4 THE COURT: We can maybe give you some time. Since
5 we won't be starting any evidence with the jury, we can maybe
6 take a little bit longer. How long do you think you would
7 need from the time you get those to look them over?

8 MR. VAN NEST: Would we want to have a couple of
9 hours or a morning? I mean if we can --

10 THE COURT: I'm not going to keep the jury panel
11 sitting here for a couple of hours.

12 MR. M. JONES: Anything you can give us, Your Honor.
13 Forty-five minutes, an hour. It is just distributing it to so
14 many defendants.

15 THE COURT: I understand.

16 MR. M. JONES: Anything you could do for us we sure
17 would appreciate it.

18 THE COURT: We will give you what time we can. We
19 will see what time we get started and how we are going. I
20 will try to get the jury coordinator to get it as done as
21 quick as possible and get it to you.

22 Okay. Finally, just dealing with the trial, there
23 are a couple of motions that I, from my reading of them, they
24 really pertain to damages and not to liability issues, so I
25 see no reason to take those up today. But if there is a

1 reason, please tell me. That would be defendants' motion
2 regarding double recovery. Isn't that strictly a damage
3 issue?

4 MR. VAN NEST: Yes.

5 THE COURT: That will be deferred until the damage
6 trial.

7 Then CSIRO's motion to exclude defendants' damage
8 expert Britven.

9 MR. FURNISS: Yes, Your Honor.

10 THE COURT: We won't be taking those up then. What
11 about trial exhibits? I know Ms. Ferguson has met with your
12 people. Anybody have any questions on how we are going to do
13 that?

14 MR. FURNISS: I think we are current on the
15 procedure, Your Honor.

16 THE COURT: Compliments to Ms. Ferguson. I think
17 she did a great job in coordinating that and putting it all
18 together.

19 MR. VAN NEST: We do, too.

20 THE COURT: With regard to the Court's charge, we
21 need a lot of work on that. I know you have both presented
22 separate charges, even though that is not what the Docket
23 Control Order said for you to do, so I would like for you to
24 go back and do it as you were instructed to by putting them
25 both together. I want you to meet and confer.

1 Decision-makers, not low-level people but people that can
2 really call what we are willing to compromise on with regard
3 to the charge. I don't want two stacks like this
4 (indicating). I want a stack like this (indicating) that is
5 combined in one copy with the differences spelled out either
6 in bold and regular type or regular type and italics and then
7 footnotes as to what your objections are. And I would like
8 for you to really put some time into that and get that back to
9 me I'd say -- well, let me ask you how long do you think it
10 will take you to do that?

11 MR. FURNISS: Well, I think this morning helps us
12 resolve some of that. I would say Thursday of next week.

13 MR. VAN NEXT: I was going to say Friday, Your
14 Honor, but we have a lot of other activities underway.

15 THE COURT: That will be all right, Friday by noon.

16 MR. VAN NEST: Friday by noon.

17 THE COURT: Yes. I have got to have something to
18 read over the weekend. I'm only kidding. I hope you know
19 that.

20 MR. VAN NEST: We can help with that.

21 THE COURT: Oh, you have already done your part,
22 both sides have.

23 All right. Let me just discuss the verdict forms
24 with you just for a second. In reviewing those a question
25 that has come up to my mind -- and I know plaintiffs are

1 taking the position that infringement should be submitted by
2 defendant for all of defendants' accused products. And
3 defendants seem to be taking the position that it should be
4 submitted -- that all -- each defendants' -- all of their
5 accused products need to be submitted to the jury and answered
6 individually. Am I correctly reading the positions of the
7 parties or not?

8 MR. FURNISS: I believe so, Your Honor. Yes, Your
9 Honor. That is our position that there are literally
10 hundreds, if not thousands, of products; but they are all
11 compliant with the standard. And the defense issues are the
12 same as to each of them. So to have the jury go through
13 product by product, would take forever. We will have to raise
14 our trial estimate to 60 or 100 hours if we are going to go
15 product by --

16 MR. VAN NEST: I don't see how you could have a
17 damages trial, Your Honor, without knowing which products have
18 been found to infringe. I mean it seems to us that they have
19 the burden of proof and they have originally started off
20 accusing far more products than we have now, but you can't go
21 on to Phase II without knowing which products have been found
22 to infringe. We have tried to create a form that --

23 THE COURT: I didn't see Appendix A. Was it
24 attached and --

25 MR. VAN NEST: Excuse me?

1 THE COURT: Appendix A to your proposed form which I
2 think is referred to as a matrix or something. Maybe it just
3 didn't get printed out, but I didn't see it. How big is it?

4 MR. VAN NEST: Do we have a copy of that? I thought
5 we had submitted it to the Court with pretrial.

6 THE COURT: Well, that is okay. Go ahead.

7 MR. VAN NEST: But in any event, the reason to get
8 findings per product we all make a wide range of products,
9 some of which are accused and some of which are not.

10 THE COURT: But I guess my question is, of the
11 accused products for each defendant, are there differences as
12 related to how they function that would make some of -- some
13 of them infringe and some of them not infringe?

14 MR. VAN NEST: I don't think so. I think that
15 infringement defenses that we have apply to all accused
16 products. I just want to be sure. Part of this exercise is
17 giving us certainty on what they say is accused and what is
18 not. I would like to get a finding on it --

19 THE COURT: You mean certainty as to what CSIRO said
20 is accused? You don't have certainty on that?

21 MR. VAN NEST: We don't. We have been trying to get
22 it.

23 MR. FURNISS: Your Honor, the allegation is that
24 products that practiced the -- a tiny bit of products that
25 practiced the "a" standard and products that practiced the "g"

1 standard and products that practiced the draft "n" standard
2 infringe. The defense on all of them is absolutely common as
3 far as I can tell. I have never heard or seen --

4 THE COURT: But have you identified --

5 MR. FURNISS: Oh, yes.

6 THE COURT: -- each of their products you are
7 accusing in this case?

8 MR. FURNISS: Oh, yes, Your Honor.

9 THE COURT: Specifically by product number?

10 MR. FURNISS: Yes, and we have relied upon their
11 interrogatory answers. The very first interrogatories that
12 went out said identify your products that are compliant with
13 these standards, and all of the products that have been
14 identified in defendants' interrogatories that practice the
15 standard have been accused. Ones that don't, have not been.

16 THE COURT: Well, I think that defendants are
17 entitled to know specifically what products are accused. But
18 I don't think it is helpful to the jury to have to go through
19 and answer as to 100 accused products of one defendant if
20 there are no differences in how they operate or how they would
21 be infringed.

22 So what I am going to do is order the plaintiff to
23 submit a list by defendant, listing all accused products by a
24 date certain. And then I want defendants to review that list;
25 and if there is any accused product on that list that would be

1 different than the other accused products as to how they would
2 operate or how they would infringe, then you need to identify
3 that product and how it is different from the others.

4 MR. VAN NEST: We will do it.

5 THE COURT: All right. And then what we will do --
6 hopefully, that will narrow it down. Hopefully, it will give
7 defendants certainty as to what is accused. Hopefully, all of
8 the defendants will not -- will agree of the ones accused they
9 all practice the -- or, you know, operate the same way and
10 would infringe the same way if indeed they infringed, and
11 their defense will all be the same. If that is not the case,
12 the plaintiff will have the burden, and we will submit just
13 those accused products that I identify after you have gone
14 through this exercise as being different from the others.
15 Okay?

16 MR. VAN NEST: Fair enough.

17 THE COURT: When can you have that list to them, Mr.
18 Furniss?

19 MR. FURNISS: We already did it with our
20 infringement contentions, so other than updating it from very
21 recent interrogatories, so we could do it by next Friday or
22 earlier. Frankly, probably by Wednesday.

23 THE COURT: Let's have it to them by noon on
24 Wednesday.

25 MR. FURNISS: Okay.

1 THE COURT: And, again, I want a simple chart, you
2 know, by defendant, product numbers.

3 MR. FURNISS: Yes, sir.

4 THE COURT: When can you have your group respond to
5 that by?

6 MR. VAN NEST: Could we do that by Friday noon,
7 Colleagues, you think?

8 Friday noon.

9 THE COURT: Friday noon would be great. I think
10 that will work well. Thank you.

11 MR. VAN NEST: Thank you.

12 THE COURT: All right.

13 MR. VAN NEST: Your Honor, can I ask a question
14 about the estimated trial times --

15 THE COURT: Yes.

16 MR. VAN NEST: -- we are going to submit. Do you
17 want us to exchange those, or can those be submitted just to
18 Your Honor?

19 THE COURT: Would there be a reason why you wouldn't
20 want to exchange them?

21 MR. VAN NEST: I think at this point we have
22 exchanged witness lists, we have the will-call, may-call; but
23 I think with respect to timing, we prefer just to submit that
24 to Your Honor. But we will exchange them if the Court wishes.

25 MR. FURNISS: Your Honor, I think they should be

1 exchanged. The defendants' witness list is well over a
2 hundred witnesses. It doesn't seem to be realistic that that
3 is going to happen. We are very prepared to identify who we
4 are going to call and to tell defendants. I think it would
5 accelerate and make the trial much more efficient if we know
6 who is coming.

7 THE COURT: Wouldn't you like to know who is coming
8 and how long --

9 MR. VAN NEST: Well, I would because their will-call
10 witness is currently 34 witnesses.

11 THE COURT: Then let's exchange.

12 All right. What else with regard to trial structure
13 is what I am basically dealing with?

14 MR. FURNISS: Yes, Your Honor. I think it would be
15 a good idea -- I think we mentioned it -- but that the parties
16 give advance notice of say 48 hours of the order of witnesses
17 and any demonstratives to be used for those witnesses and for
18 opening statement, they be disclosed ahead of time so there is
19 no problem.

20 MR. VAN NEST: That is not unreasonable, 48 hours.
21 We can work out the times, but advance notice of graphics and
22 advance notice of witnesses.

23 THE COURT: All right. Will be 48 hours unless
24 y'all agree otherwise.

25 MR. FURNISS: Thank you, Your Honor.

1 THE COURT: What else dealing with the trial itself?
2 Then we will get into these motions.

3 MR. VAN NEST: One other trial issue, Your Honor,
4 and that is confidentiality. There are some documents that
5 are confidential and possibly some testimony. And I haven't
6 thought through, in light of Your Honor's rulings, how much
7 will affect Phase I. The confidential documents in Phase I
8 would be things like our source code or information about how
9 to build our products. I'm not too worried about that. That,
10 I think, should remain confidential. We just don't want
11 witnesses in open court describing the details of somebody's
12 source code, but I don't think that is going to happen.

13 If it does, what I would propose is that the jury be
14 given whatever the written material is, we publish it to them,
15 and the witness, you know, be talking at a little higher level
16 of generalities so that we are not talking about specific
17 details of product operation in open court.

18 MR. FURNISS: It is our view that the source code or
19 the RTL code is not necessary to -- unless defendants were to
20 cross-examine on what do you base your contention, Dr. Monsen,
21 that this product does this? He would say, well, I've got a
22 report from an expert that required the code; but that would
23 not require to disclose the code, so I don't believe that is
24 going to be a problem.

25 MR. VAN NEST: The only other area that may come in

1 Phase I is discussion of either sales or revenues. I mean we
2 have a motion in limine on this. But none of the defendants
3 want to have individual defense witnesses testifying as to
4 what their product margins are in open court. Again, if that
5 became an issue in Phase I we would ask that the information
6 which is relevant be published to the jury in written form and
7 the witness be asked to talk in general terms. We have the
8 margins -- we are only using the margins as set forth on
9 Exhibit A which jurors haven't been provided. Rather than
10 close the courtroom, we do want to protect information about
11 product margins and that sort of thing.

12 MR. FURNISS: I don't have a problem with that, Your
13 Honor.

14 THE COURT: All right. Sounds like an agreement to
15 me. Y'all meet and discuss and do that.

16 What about jury notebooks? Are y'all planning to
17 prepare juror notebooks or not?

18 MR. FURNISS: I was just going to inquire about
19 that. We think it would be a good idea for the jurors to have
20 notebooks. Let me ask you, are you referring where they take
21 notes or notebooks that also have material in them or a
22 glossary?

23 THE COURT: Oh, no. I will provide them with
24 notepads to take notes, but something that will have a copy of
25 the patent, the claim construction chart, or other general

1 information that might be helpful to them or not.

2 MR. FURNISS: We are very much in favor of that,
3 Your Honor.

4 MR. VAN NEST: We are too, Your Honor. We would
5 like to -- and we understand we need to meet and confer with
6 Counsel on this, but we think a notebook which has the patent,
7 the claim construction, and possibly the key pieces of prior
8 art would be appropriate. If the patent and the claim
9 construction are going to be there and we are going to be
10 talking about various prior art references that are more
11 important than others, we would like to include those as well.

12 THE COURT: Well, y'all meet and confer on that.

13 MR. FURNISS: Yes, sir. We don't believe prior art
14 should be in the juror notebook. That is getting into
15 evidence.

16 THE COURT: Well, meet and try to agree. And if you
17 can't, we will either have them or I will decide.

18 Okay. Let's move on to one more motion, and then we
19 are going to take a brief recess. And that is defendants'
20 motion to supplement based on reexamination, which is Docket
21 507 in the 549 case, 579 in the 550 case, and 460 in the 551
22 case.

23 MR. VAN NEST: Your Honor, I don't think there is a
24 lot to be said on it. The Patent Office has been provided
25 with the reexam. The Patent Office has issued an order of

1 reexam on the '069. The case law that we submitted suggests
2 that that issue is relevant to willfulness. Again, it goes to
3 whether it was objectively reckless or not to believe that the
4 patent was invalid. We now have affirmation by the Patent
5 Office that there is a reason to reexam and question the
6 patentability.

7 I think the only cases to consider that issue
8 recently post-Seagate have said it is relevant. And we are
9 asking to supplement if willfulness is going to be tried as
10 part of Phase I, which it will be, we think that evidence
11 ought to be made available. We obviously presented it as soon
12 as we had it. The order of reexamination was issued very
13 recently, and we very promptly thereafter brought it to the
14 Court's attention.

15 I think the case that we presented is Lucent v.
16 Gateway on this issue which was decided post-Seagate. And it
17 indicates that these orders are relevant and probative on the
18 issue of willfulness, particularly the objective recklessness
19 standard.

20 THE COURT: Response?

21 MR. FURNISS: Your Honor, first of all, Seagate says
22 that principally you assess willfulness at the time before
23 filing suit, not afterwards. But, secondly, when Mr. Van Nest
24 says we did this closely as possible, frankly, we think there
25 is some manipulation going on here. This request for reexam

1 was filed just two months ago with art that the defendants
2 have had for many, many years.

3 But most importantly the Federal Circuit has held in
4 the Hoechst Celanese case that the granting of a request for
5 reexamination has no probative value as to the likelihood of
6 patentability. The statistics from the Patent Office show
7 that last year out of 577 requests for reexamination, all but
8 17 were granted; and that all it shows is that there has been
9 some art presented to the Patent Office that it hadn't seen
10 before. It is not a determination in any way, and it would
11 confuse the jury and would be very, very inadmissible evidence
12 and create error in the record.

13 The Federal Circuit has held that there is -- a
14 substantial question of patentability does not establish a
15 likelihood of patent invalidity, so we have to explain to the
16 jury what a reexam is, and they would not understand it.
17 Approximately, again -- according to the Patent Office,
18 approximately 80 to 89 percent of all reexaminations result in
19 some claims being reaffirmed. So this was timed, Your Honor,
20 so that the only action that would happen before this trial
21 was that a reexam had been opened, but nothing had been done.

22 And, frankly, I think it is manipulation by the
23 defense to do this. The art they cited in the reexam they had
24 for years. And we get this reexamination request right before
25 the trial, and we say we are going to tell the jury about it.

1 It would be highly prejudicial to CSIRO and would confuse the
2 jurors even more than can be imaginable and would waste this
3 proceeding with a real problem.

4 MR. VAN NEST: Your Honor, statistics are
5 misleading. I think we submitted statistics showing that in
6 75 to 80 percent of these cases the patent either falls or is
7 substantially cut back. So it may well be many reexams are
8 granted. Most of them result in one or more claims being
9 found invalid or one or more claims being dramatically
10 modified. So what Counsel is talking about is relevance or
11 irrelevance to the validity issue. That is not why we are
12 offering the reexam. It is being offered on the question of
13 willfulness. Was it objectively reckless to believe, as all
14 of the defendants do, that this patent was invalid?

15 The fact that the Patent Office has now indicated
16 there is a substantial question of patentability is probative
17 of that. The cases decided since Seagate all support that.
18 The Lucent case indicates it is highly probative. The
19 Ultratech case indicates that a plaintiff would not even have
20 a good-faith basis for alleging willful infringement if there
21 had been a reexam and the reexam was pending.

22 So the limited relevance of this is on willfulness.
23 We are more than willing to craft a jury instruction in which
24 the Court indicates that it is relevant to that issue and that
25 issue only, but we think it is highly probative, it is very

1 recent. And, again, on the willfulness question, we are
2 entitled, I think, to present it to the jury.

3 THE COURT: What about his argument that defendants
4 have had the prior art for many, many months?

5 MR. VAN NEST: You have a right to file a reexam
6 whenever you wish to do that, Your Honor. And this happens in
7 many cases. It can be filed early, it can be filed late. You
8 make decisions about what art is appropriate and what isn't.
9 You make decisions about what is happening in the Patent
10 Office itself. We certainly did not file this, Your Honor,
11 with the idea that we would get a reexam and we would, you
12 know, run into court with it. That is not the idea. We have
13 a legitimate reexam request that has been granted. It is also
14 highly probative of the willfulness issue.

15 THE COURT: Well, I visited this issue before, and I
16 have never allowed it before; but I am going to take another
17 look at your cases and I will take this one under advisement.

18 MR. VAN NEST: Thank you, Your Honor.

19 THE COURT: We will be in recess for ten minutes.

20 (Recess was taken.)

21 THE COURT: Please be seated.

22 All right. I want to work through now the various
23 motions to exclude, and we will take up CSIRO's motion to
24 exclude Goolkasian, defendants' inequitable conduct expert in
25 the 549 case, Docket 375; 550 case, 441; 551 case, it is

1 Docket 323. Who would like to be heard on that?

2 MR. RITCHEY: Good morning, Your Honor. Gary
3 Ritchey for CSIRO.

4 THE COURT: Mr. Ritchey.

5 MR. RITCHEY: Your Honor, let me begin by noting
6 that there is a recent Federal Circuit case Sundance v.
7 Demonte Fabricating. It came down actually on December 24th
8 of last year. That case we believe makes it very clear that
9 in order for an expert to testify, they have to -- on any
10 technical issue they have to be one of skill in the art or
11 have expertise on that issue. Mr. Goolkasian is being offered
12 to testify on areas for which he is not competent. Mr.
13 Goolkasian admitted in deposition that he is not of skill in
14 this art; that as a patent examiner he would not have been one
15 who would have even examined a patent in this art; and he
16 basically has no technical training in this particular area.
17 However, he is being offered to provide a variety of opinions.

18 If we could turn to the next slide. I'm sorry, the
19 one before that.

20 He has been offered to talk about practice and
21 procedures before the PTO, duty of candor and materiality, the
22 prosecution history of the '069 patent, and his conclusion on
23 the failure of the applicants to meet their duty of candor and
24 good faith. As to practice and procedures before the PTO,
25 Your Honor, we don't think it is necessary to have a Patent

1 Office expert so testify. We think that there are mutual
2 materials which can be offered to the extent that a jury may
3 need to be informed of those issues. To the extent that
4 inequitable conduct, of course, will be tried to the Court,
5 the Court is well-familiar with these issues already.

6 In terms of duty of candor and materiality, again,
7 we think that testimony on this issue invades the province of
8 the Court. The Court is more than capable of issuing any
9 necessary instructions on those duties, and there shouldn't be
10 a need for a patent law expert --

11 THE COURT: You say instructions; but since both
12 sides have stipulated all of the inequitable conduct defenses
13 will be before the Court, is there anything that this witness
14 would be testifying to in front of a jury?

15 MR. RITCHEY: Your Honor, he was offered solely for
16 inequitable conduct, so I would hope not.

17 THE COURT: Let me just ask defendants; is that
18 correct?

19 MR. SHELTON: He would not, Your Honor.

20 MR. RITCHEY: Your Honor, in terms of the
21 prosecution history of the '069 patent in his expert report we
22 are in a situation now where he is actually basically using
23 that section to contend that new matter was added during
24 prosecution. We believe under the Sundance case he is not
25 competent to testify to that, he is not competent to make a

1 determination about the particular file history and the
2 contents of this invention or whether new matter was added.
3 And in terms of the failure of applicants to meet their
4 duty --

5 THE COURT: Say that again as to the prosecution
6 history.

7 MR. RITCHEY: Well, in a section titled "prosecution
8 history," Your Honor, in his report, what he is using this
9 section to do is basically argue and make contentions that new
10 matter was added. This, Your Honor, goes back to something
11 the Court already decided in the Buffalo case; that basically,
12 the radio frequency versus the 60 gigahertz issue. Your
13 Honor's decision was upheld by the Federal Circuit on this
14 issue.

15 Again, we don't think that Mr. Goolkasian is able to
16 review either the specification or the prosecution history and
17 render any competent opinion particularly in light of the
18 Sundance case. He is not versed in this technology. In terms
19 of the failure of the applicants to meet their duty of candor
20 of and good faith --

21 Could I have the next slide, please.

22 What we have here is a situation again where he is
23 rendering opinions in a situation where he is not, again,
24 competent in the art itself and, therefore, not really able to
25 judge materiality of the art. He didn't consider all of the

1 art before the PTO. In particular, he didn't consider one of
2 the most important references, the patent by Pommier and
3 whether the art he says should have been submitted to the
4 PTO --

5 THE COURT: Isn't all of that just cross-examination
6 though rather than --

7 MR. RITCHEY: It could be done in cross-examination,
8 Your Honor; but at the same time under the Sundance case we
9 believe that he is not properly offered as a witness in those
10 areas at all. Again, he doesn't have the technical
11 competence; and in order to provide opinions as to the art
12 before the PTO, he would have to have those -- competence.

13 Basically, he is just doing personal fact-finding;
14 and, Your Honor, we think that is for you, for the Court, and
15 it is not proper to have testimony on that issue.

16 THE COURT: Okay. Well, I am not going to strike,
17 and I am going to deny the motion. I will grant it to the
18 extent he wouldn't come in in front of the jury based on the
19 parties' stipulations; but as trial before the Court, I will
20 at least allow plaintiff to qualify the expert and then --
21 defendant qualify the expert; and then if plaintiff wishes to
22 take him on voir dire to challenge his qualifications, I will
23 rule on it at that time.

24 MR. RITCHEY: Thank you, Your Honor.

25 THE COURT: Thank you.

1 All right. Let's move on to Rosenthal, CSIRO's
2 motion to exclude Rosenthal, who is the RAND expert. That is
3 in the 549 case it is Docket 385, in the 550 case it is 451,
4 and in the 551 case it is 332. Who would be heard with regard
5 to that?

6 MR. FURNISS: I will, Your Honor, thank you very
7 much.

8 THE COURT: Let me clarify again if this is a RAND
9 expert this would only to be the Court and not to the jury;
10 are we in agreement on that?

11 MR. FURNISS: I believe --

12 MR. VASQUEZ: Yes, Your Honor.

13 MR. FURNISS: -- it is defendants' call, yes. Your
14 Honor, there is no such thing as a RAND expert. Mr. Rosenthal
15 simply says that in his personal opinion the term RAND
16 reasonable, which is the issue, the issue we are addressing
17 here, means very, very low or zero. And he says -- and the
18 argument is that we have an unequivocal contract.

19 If we can look at Slide 6.

20 CSIRO sent a RAND letter on 802.11a. It was on the
21 form provided by the IEEE. It is admitted that it is
22 unambiguous -- there we are. They admitted that it is
23 unambiguous, and the interpretation of an unambiguous contract
24 is a question of law for the Court. We have cited a great
25 deal of Texas law that is directly on that point.

1 He then says, well, very -- "reasonable" means very,
2 very low or not at all. But the very authorities he cites say
3 exactly the opposite, so if we can --

4 THE COURT: Well, isn't that just impeachment?

5 MR. FURNISS: If it is just for the Court, Your
6 Honor, I suppose so. This relates to our summary judgment.

7 THE COURT: Motion is denied.

8 What is next -- oh, I have got the list. Okay.
9 Motion to exclude -- CSIRO's motion to exclude Ungerboeck, the
10 prior art inventor. Docket No. 439 in the 549 case; 508 in
11 the 550 case, 307 in the 531.

12 MR. J. JONES: Good afternoon, Your -- morning, Your
13 Honor, Jordan Jones on behalf of CSIRO. Your Honor, under
14 Federal Rule of Evidence 701(c), an expert is not permitted to
15 give opinion testimony if those opinions are based on
16 scientific, technical, or other specialized knowledge. If so
17 it then is based on -- it falls under Rule 702. In this
18 instance Dr. Ungerboeck has a PhD in electrical engineering
19 and is credited as being the inventor of trellis-code
20 modulation. His report and expertise is definitely based on
21 scientific and technical knowledge.

22 In this instance the defendants have failed to
23 submit an expert report on behalf of Dr. Ungerboeck, and we
24 see this as an end-run around this Court's order in terms of
25 the disclosure deadlines under the Rules.

1 THE COURT: Okay. Response?

2 MR. CORDELL: Thank you, Your Honor, Ruffin
3 Cordell. I will be speaking on behalf of the defendants.

4 Ms. Ferguson, thank you.

5 May it please the Court. Your Honor, what we have
6 here in the motion to strike Dr. Ungerboeck is really an
7 effort to exclude this man's factual testimony. He is a
8 scientist to be sure. He is certainly knowledgeable about
9 highly-technical matters. But we are not offering him as an
10 expert. We are asking him to come into court and explain what
11 he did and what happened to him and the actions he took and
12 the results that he achieved in his own work. This is
13 percipient testimony at its core, and so we believe --

14 THE COURT: Well, I think they are only moving to
15 strike his expert testimony, aren't they?

16 MR. CORDELL: Technically, Your Honor, they moved to
17 strike certain paragraphs of his declaration that we submitted
18 as part of the summary judgment motion. That is the motion
19 that they filed. It was -- several of the numbered paragraphs
20 I can pull them out for, Your Honor. But we also believe that
21 as part of the MIL process they at least suggested they were
22 hoping to exclude him altogether, so perhaps I should get
23 clarification.

24 THE COURT: Clarification, are you seeking to
25 exclude him all together or just expressing any opinions?

1 MR. J. JONES: I think both, Your Honor. In this
2 motion we are talking about right now it has to do with his
3 expert opinion. But we believe that what Dr. Ungerboeck's
4 views are on his invention have no place in his trial. The
5 issue that is pending right now before this Court and possibly
6 before the jury is whether the rate 1/2 TCM encoder of the
7 '069 patent, whether the accused products have an equivalent
8 circuit structure that performs the function as defined by the
9 Court.

10 In this instance what Dr. Ungerboeck did and what
11 his views of his own invention are, are not relevant. What is
12 relevant is what is in the patent, and Dr. Ungerboeck's
13 declaration. The parts that aren't expert testimony don't
14 speak to that at all.

15 MR. CORDELL: Dr. Ungerboeck has been brought into
16 this courtroom, Your Honor, not by defendants. We didn't call
17 him in. The party that called him in was CSIRO. The Court
18 heard extensively about Dr. Ungerboeck's work in the Buffalo
19 case, and that testimony was then used, that evidence was then
20 used in the Federal Circuit appeal as their primary piece of
21 evidence with respect to the trellis-coded modulation
22 limitation.

23 What do I mean by that? They rely on Dr.
24 Ungerboeck's work in the guise of the 1987 paper. There was a
25 figure from it. I do have some slides I will try to bring

1 up. So in Paragraph 12 of the declaration that they target,
2 Dr. Ungerboeck talks about his 1987 paper, and he talks about
3 TCM. What CSIRO ultimately does with this evidence is they
4 use it as the fundamental evidence to suggest that a
5 convolution encoder is the same thing as trellis-coded
6 modulation. It is the primary evidence they rely on.

7 So what I have up here in Slide No. 5 is a reference
8 to his 1987 paper where he talks about the facts, the factual
9 underpinnings of his work in inventing trellis-coded
10 modulation, an award-winning technology.

11 MR. J. JONES: Your Honor, we did not inject Dr.
12 Ungerboeck into this paper. To the extent he arises at all it
13 is in the sense of the prior art background in terms of
14 showing what one of ordinary skill in the art in reading the
15 '069 patent would have understood the rate 1/2 TCM encoder to
16 be. It wasn't Dr. Ungerboeck's views and what Dr. Ungerboeck
17 did. It is viewed from the person of ordinary skill in the
18 art.

19 Now, if Dr. Ungerboeck had been properly disclosed
20 and was going to opine under that standard, we might be
21 talking about something different, but that is not what he has
22 been asked to do, and that is not what this declaration does.
23 What this declaration does is it is being cited line for line
24 along with the defendants' designated experts to support their
25 opinion that they have -- that the convolution encoders in the

1 accused products do not meet the data reliability enhancement
2 limitation of the '069 patent.

3 In fact, in Dr. Ungerboeck's declaration at
4 Paragraph 18, the last sentence on Page 7, he states, "Both
5 coding and mapping and TCM are necessary for enhancing data
6 reliability and are not separable." Well, that is the exact
7 mantra that has been touted by defendants' designated
8 experts. So it is clear and transparent what they are trying
9 to do. They are trying to bring him in as the ultimate expert
10 that has not been disclosed to give these opinions, and he is
11 touting the exact same lines that are being offered by
12 defendants' experts.

13 In addition, the term "data reliability enhancement"
14 doesn't even appear in Dr. Ungerboeck's works. That is a term
15 of art or a term that has been coined by the inventors of the
16 '069 patent and has a very specific meaning in the context of
17 the patent in this litigation. So it is very transparent in
18 terms of what they are asking him to do.

19 MR. CORDELL: Your Honor, I can't stress enough that
20 we have to look at this in the proper context. Dr. Ungerboeck
21 is here talking about his factual work. He is talking about
22 facts. He is not talking about opinions. He is talking about
23 facts. But I take direct issue with Counsel's statement about
24 whether nor not they are relying on Dr. Ungerboeck because
25 they are. In the slides they are going to present to you, I

1 think, as part of this morning's summary judgement analysis of
2 the infringement case, they do it again.

3 They cite to Dr. Ungerboeck's paper, and they use it
4 as substantive evidence to try to suggest that a convolution
5 encoder is part and parcel of trellis-coded modulation. That
6 was the fundamental fact that we believe created a record that
7 was ultimately appealed to the Federal Circuit that was the
8 fundamental error in the Buffalo case. It was this assumption
9 that a convolution encoder is part and parcel of trellis-coded
10 modulation that led the Federal Circuit to rule the way it
11 did. It is the fundamental reason why we are contesting
12 infringement in this case, frankly. There are several, but
13 that is certainly a very, very large one. And they are doing
14 it again.

15 So what we are asking is for Dr. Ungerboeck to be
16 heard. We disclosed him in October, October 10. We did a
17 quick count, and there have been over 200 days of depositions
18 taken in this case. There have been over 50 days of
19 deposition taken since October 10th. CSIRO has practiced
20 studied ignorance with respect to Dr. Ungerboeck. They don't
21 want to talk to him, they don't want to hear from him. They
22 are very careful because they don't want to involve him. They
23 don't want his testimony. They don't want this evidence.

24 Instead, what they want to do is rely on the hearsay
25 in his paper. They took this hearsay to the Federal Circuit

1 and they claimed it was fundamental to trellis-coded
2 modulation that a convolutional encoder was included.

3 What does Dr. Ungerboeck say about that? When you
4 read his declaration, what he says is, in fact, that TCM does
5 not require a convolutional encoder. I have Paragraph 18 from
6 his declaration up on the slide, Slide No. 7. I will read it
7 in the record. He first references the paper Figure 19 of the
8 1987 paper. Then he says, "However, these are simplified
9 logical block diagrams that do not necessarily imply that a
10 stand-alone convolutional encoder can be extracted from a TCM
11 structure. Indeed, I know even of cases where TCM scheme
12 cannot be described as a combination of a convolutional
13 encoder and a signal mapper. The coding scheme and TCM can be
14 implemented with a finite-state machine with a given number of
15 states and specified state transitions which does not have to
16 be a convolutional encoder."

17 He is simply clearing up the hearsay
18 misunderstanding that CSIRO brought into court and is relying
19 on it all the way through this. It is factual testimony --

20 THE COURT: Is that an issue in this case?

21 MR. CORDELL: Absolutely, Your Honor. It is a
22 fundamental issue.

23 THE COURT: Is it an issue that you have expert
24 witnesses on?

25 MR. CORDELL: We do.

1 THE COURT: Was he designated as an expert witness?

2 MR. CORDELL: He was not.

3 THE COURT: That sounds -- what you just read sounds
4 an awful lot like an expert opinion to me.

5 MR. CORDELL: I apologize. I know it is
6 complicated, and the technology -- it is certainly imbued in
7 the technology, but that is what he does for a living. When
8 he goes to work every morning this is what he does. And this
9 is what he did in 1987. At the time that -- again, CSIRO
10 tells us that the world was informed that a convolutional
11 encoder was part and parcel of a trellis-coded modulation
12 scheme. He says that is not true, you are misreading my
13 paper. The hearsay that you are relying on is not reliable.
14 That is what he is saying here. It is not expert testimony.
15 He is refuting the characterization of his own work. That is
16 all he is doing plain and simple.

17 THE COURT: Why didn't you identify him as an
18 expert?

19 MR. CORDELL: He works for a third-party, Your
20 Honor, he works for Broadcom who has some involvement here,
21 but they haven't shown up. We aren't paying him. He is
22 employed by Broadcom, and we have gotten the time from him
23 that we could. And we have listed him as a fact witness. We
24 got a declaration from him. And, frankly, we fully expected
25 that CSIRO would depose him if they were concerned about his

1 testimony. But, again, they practiced this studied ignorance.
2 They have made sure that they don't go and depose Dr.
3 Ungerboeck because they don't want him to clear up this
4 record. They don't want to have him comment about what really
5 happened in 1987. They don't want to hear the other side of
6 the story.

7 THE COURT: Isn't what happened in 1987 a matter of
8 what the documents from 1987 show?

9 MR. CORDELL: They do. That is absolutely correct.
10 However, that is only part of the story. So there were many
11 other facts that aren't reflected in the paper; or better
12 said, the paper is subject to misinterpretation. The reason
13 why we have hearsay rules is to prevent people from making
14 out-of-court statements and then relying on them for the truth
15 of the matter asserted. That is fundamentally what CSIRO is
16 doing here. They are saying that because that block diagram
17 that they show again on Slide 18 of their presentation, that
18 figure that -- the Figure 1 on Page 13 of the paper, because
19 that block diagram shows two things side by side, they
20 immediately conclude that they are part and parcel, one
21 structure, they are joined at the hip, and they are always the
22 same thing. That is not true.

23 THE COURT: I know you disagree with them on that,
24 and I take it you have got experts that say that and they have
25 experts that say that, right?

1 MR. CORDELL: Yes.

2 THE COURT: I am going to grant the motion as to any
3 expert opinions or any opinions that might be expressed by Dr.
4 Ungerboeck, as he has not been timely identified as an expert.

5 MR. CORDELL: Your Honor, could I ask for one
6 clarification? We often hear inventors get on the stand and
7 sort of discuss their work. Would it be permissible to have
8 Dr. Ungerboeck come in like an inventor and simply direct his
9 testimony only to the work that he has done, so he will only
10 talk about the factual work that he has actually performed, no
11 opinions; this is what I did, this is when I did it, and this
12 is how I did it?

13 MR. J. JONES: Your Honor, I want to be heard on
14 that. The cases that are cited in defendants' opposition, I
15 think their surreply, the cases in which an inventor has been
16 brought in and permitted to testify about his or her invention
17 are those cases in which the invention is at issue in the case
18 where it is the invention of the patent-in-suit. The
19 inventors in those cases were allowed to testify about the
20 background in their invention, much like the CSIRO inventors
21 will testify at trial here.

22 But to have Dr. Ungerboeck come in and testify about
23 what he thought and what his invention was, is really
24 irrelevant, prejudicial, and confusing to the jury. They have
25 experts that have been properly designated to talk about those

1 things. Even in talking about his invention, it is going to
2 be highly technical and scientific, as you can see from the
3 declaration, at least the one excerpt you have seen today.

4 THE COURT: All right. Mr. Cordell, I am not going
5 to foreclose that possibility, but I'm not going to say that
6 you can. What I will do as we proceed in the case and I
7 become a little more acquainted with the issues at hand, I
8 will allow you to tender him at some point outside the
9 presence of the jury and let me hear what you are going to be
10 asking him and how that might relate from a purely factual
11 standpoint, whether it is relevant or prejudicial or
12 confusing. And I will allow defendants to cross-examine him
13 outside the presence of the jury, and then I will decide
14 whether to allow his testimony.

15 MR. CORDELL: Thank you, Your Honor.

16 THE COURT: But I will caution you, there would be
17 no opinions in that testimony.

18 MR. CORDELL: Understood.

19 THE COURT: So I am not sure how helpful that will
20 be if you have got other experts that can express those
21 opinions.

22 All right. Next is defendants' motion to exclude
23 Levesque, CSIRO's obviousness expert, Docket No. 444 in the
24 549 case, 513 in the 550 case, and 394 in the 551 case. Who
25 will be arguing that on behalf of defendants?

1 MS. ANDERSON: Your Honor, I will. Thank you.

2 THE COURT: All right. Ms. Anderson.

3 MS. ANDERSON: Thank you, Your Honor, Christa
4 Anderson for Intel. The fundamental problem here, Your Honor,
5 is Dr. Levesque rendered opinions on the subject of
6 obviousness.

7 THE COURT: I'm sorry, I couldn't hear you.

8 MS. ANDERSON: Yes, I'm sorry. Can you hear me now,
9 Your Honor?

10 THE COURT: Yes.

11 MS. ANDERSON: The fundamental issue presented by
12 this motion is that Dr. Levesque rendered opinions on the
13 subject of obviousness, yet he was never apprised by Counsel
14 for CSIRO as to what "obviousness" means from a legal
15 perspective. His opinion is purely issued under his lay
16 understanding of what "obviousness" means.

17 He also was never provided with Your Honor's claim
18 construction. Because of these issues, Your Honor, his
19 opinion is clearly 403. It would be misleading to a jury for
20 an expert to take the stand and opine on the ultimate issue of
21 obviousness, yet have actually never understood what the legal
22 standard was or what Your Honor had declared was the meaning
23 of the terms of the patent.

24 THE COURT: Response.

25 MR. FURNISS: Your Honor, Dr. Levesque is being

1 offered solely on secondary considerations of
2 non-obviousness. He is not opining on any of the prior art,
3 and he is an expert on the secondary considerations or the
4 non-objective indicia. It is clear from his report and from
5 his deposition that that is what he is testifying about. He
6 said he underread the patent and understood the invention, but
7 he is not opining on anything that goes to the claims and he
8 is not a legal expert and he is not opining on that.

9 What he is opining about -- and I should mention
10 that he is an adjunct at Worcester Poly in Massachusetts which
11 specializes in wireless, which has a Center for Wireless
12 Networking which held two very important conferences. He is
13 going to testify that 20 or 30 companies attempted to build a
14 high-speed wireless LAN and couldn't do it.

15 Now, in his report his statement of the objective
16 consideration of non-obviousness is exactly accurate. It is
17 exactly what the Court's instruction will say. It is exactly
18 what the Federal Circuit is saying.

19 THE COURT: Has he reviewed the claim construction
20 opinion?

21 MR. FURNISS: He has now. He didn't then, but he is
22 not opining on claims at all. He is opining on the history of
23 the development of wireless LANs.

24 THE COURT: Response?

25 MS. ANDERSON: Yes. Thank you, Your Honor. With

1 due respect to Counsel, Dr. Levesque doesn't simply opine in a
2 general sense on secondary considerations related issues. Dr.
3 Levesque opines on the question of obviousness. It is in his
4 report. The word is in his report.

5 THE COURT: Is that correct?

6 MR. FURNISS: He says that the non-objective indicia
7 of non-obviousness suggests that the patent was non-obvious.

8 THE COURT: Do you plan to have him testify to that
9 ultimate conclusion at trial, or just as to the secondary
10 consideration?

11 MR. FURNISS: Only as to the secondary
12 consideration.

13 THE COURT: Does that solve your problem?

14 MS. ANDERSON: Unfortunately, Your Honor, it
15 doesn't. The reason is that Dr. Levesque's whole opinion as
16 to what would be relevant on the consideration of the
17 secondary considerations of non-obviousness is premised on his
18 view of what he thinks the patent encompasses, yet he never
19 read Your Honor's construction. He doesn't know what Your
20 Honor has called for in terms of means-plus-function
21 limitations, required structures. He had no idea at the time
22 he opined about the specific constructions offered by Your
23 Honor, and so he had to have a nexus --

24 THE COURT: But he has now.

25 MS. ANDERSON: But it is too late, Your Honor. He

1 issued an opinion.

2 THE COURT: Well, has his opinion changed after his
3 review?

4 MR. FURNISS: Not at all, Your Honor. What he is
5 testifying about are things like long-felt need, failure of
6 others, commercial success. That is all. He is not
7 opining -- another expert is opining about the prior art. He
8 never mentions the prior art. And he said he understood the
9 invention for what it was. But he is not opining on that, and
10 he was aware that -- he said there are other experts who were
11 addressing prior art. Not him. He is not going to address
12 the prior art.

13 MS. ANDERSON: Your Honor, if I may. On subjects
14 such as long-felt need, which is one of the considerations
15 under secondary considerations, this is a perfect example of
16 why Dr. Levesque's opinion is so problematic. Dr. Levesque
17 thinks this is an invention where wireless LAN is a
18 limitation, yet Your Honor has held it is not. So this is the
19 kind of thing that is fundamentally at the core of his
20 opinion. The only opinion that we had from him that was
21 disclosed was one that was improperly based on a lay view of
22 what "obviousness" means, and no view and understanding of
23 what the Court has defined as the claims.

24 THE COURT: Has he reviewed the correct definition
25 for "obviousness"?

1 MR. FURNISS: Yes, he has, Your Honor. He has the
2 correct definition of "obviousness" and he has the correct
3 definition of the secondary considerations. And he is not
4 offering --

5 THE COURT: He has reviewed the claim construction?

6 MR. FURNISS: He has.

7 THE COURT: Did that change his opinions any?

8 MR. FURNISS: No, Your Honor.

9 THE COURT: All right. I am going to grant the
10 motion to the extent of allowing him to express ultimate
11 opinions as to non-obviousness, but I will allow him to
12 testify as to the opinion as to secondary considerations,
13 provided it is premised on his review of the claim
14 construction and you lay the proper predicate with the proper
15 definition for obviousness, and I will allow defendants to
16 take a follow-up deposition from him, if you would like to,
17 prior to trial.

18 How long would you need for your deposition?

19 MS. ANDERSON: No more than three hours, Your Honor.
20 Maybe two. We will keep it short.

21 THE COURT: Three hours just to deal --

22 MS. ANDERSON: No more than that, Your Honor. We
23 will keep it short. We will try to keep it to two.

24 THE COURT: I'm going to limit it to an hour, and
25 take an hour's deposition and inquire about the work that he

1 has done since -- because I think he said his opinions are
2 going to be the same. I am taking that at face value, so I
3 don't think there is any surprise or new information. But if
4 you want to go into what the basis or the predicate for his
5 opinions will be at trial, you can do that.

6 MS. ANDERSON: Thank you, Your Honor.

7 THE COURT: All right. Does that conclude all of
8 our motions to exclude witnesses or evidence? I believe it
9 does.

10 MR. FURNISS: I believe so, yes.

11 THE COURT: Let's go to motions for summary
12 judgment, and I will hear from -- we will deal with -- let's
13 deal with defendants first as to no willfulness. That is
14 Docket No. 378 in the 549, 445 in 550, and 327 in 551.

15 MR. VASQUEZ: Thank you, Your Honor. Richard
16 Vasquez on behalf of 3Com, Accton, SMC Networks, and D-Link.

17 THE COURT: Are you speaking for all defendants?

18 MR. VASQUEZ: I am, Your Honor. Now, we brought
19 this motion because in the post-Seagate world there are two
20 tests to get to the issue of willfulness. There is the
21 objective recklessness test which has to be proven by clear
22 and convincing evidence by the plaintiff in order to merit a
23 finding of willfulness. And then there is the contingent
24 subjective test. The subjective test is contingent because if
25 the Court finds that there was no objective recklessness, then

1 it doesn't get to this objective inquiry.

2 So as a matter of trial management if you decide
3 this motion as we have advocated, you will eliminate the
4 witnesses that Mr. Van Nest indicated would consume a lot of
5 court time because you have got 12 different defendants who
6 have to put on their witnesses. The plaintiffs are going to
7 take a shot at all 12 defendants and try to prove their
8 subjective intent.

9 Now, this post-Seagate world has spun the summary
10 judgment tool as an effective tool to ferret out the issue.
11 Contrary to the plaintiffs' arguments in this case, the
12 subjective relevant is absolutely irrelevant to our motion.
13 That is because you are looking at the objective test first.
14 We have established that through the case law that we cited.
15 Summary judgment is indeed proper under these circumstances
16 because the issue is not whether it is willful. The issue is,
17 is there a credible argument for either noninfringement or
18 invalidity? If you find that there is, that negates the
19 ability of a jury to come to a reasonable conclusion that
20 there has been willfulness proven by clear and convincing
21 evidence.

22 So in this case we have cited three clear
23 indicators, each of which would require you to grant our
24 summary judgment for non-willfulness. The first is the
25 Federal Circuit Court of Appeals' ruling obviousness de facto.

1 By denying the motion for summary adjudication, the Court of
2 Appeals has concluded that a reasonable jury could on the
3 evidentiary record in the Buffalo case find obviousness. As a
4 result, you screen this case out from being one of those
5 category of cases that could be reckless.

6 Secondly, the Federal Circuit Court of Appeals
7 Lourie concurrence by Judge Lourie on the issue of new matter
8 provides a separate and independent bases to conclude
9 non-willfulness. That was a finding on a stipulated bench
10 trial. So although the Court of Appeals affirmed the Court's
11 finding of fact on the issue, there was very clear statements
12 by Judge Lourie that the evidence provided the basis for a
13 reasonable alternative. In other words, if two
14 judges heard the issue or two juries heard the issue, they
15 could have decided for the defendant. By hitting that level
16 of an objectively credible argument, the new matter defense
17 provides the basis for a finding that it is non-willful as a
18 matter of law.

19 Thirdly, the Court has already said that it would
20 take under advisement the issue of the PTO's reexamination
21 order. And not to repeat anything that was said earlier, but
22 the important part is that the PTO said very clear that there
23 are 16 substantial questions of patentability.

24 It is a judicially noticeable fact that
25 three-quarters of the petitions for reexam so accepted are

1 altering the initial consideration at the Patent and Trademark
2 Office. That is a huge number. It is an objective indicia,
3 what I would call one of the two ways you can have a gold
4 standard for non-willfulness. One would be the Federal Court
5 of Appeals -- the Federal Circuit Court of Appeals finding
6 that it goes to the jury, as well as this one, Your Honor.

7 Now, is there any particular element of that that,
8 Your Honor would like to hear more about? Because that's
9 basically our case.

10 THE COURT: Thank you.

11 Response?

12 MR. FURNISS: Yes, Your Honor. The defendants have
13 repeatedly mentioned the Seagate case, and obviously the
14 Seagate case is important in what the Seagate held and what
15 the new jury instructions from the Federal Judicial Center
16 model patent jury instructions say is that you assess
17 willfulness before the initiation of litigation. So what
18 happened last week or last month or the reexam, is not
19 relevant. And if CSIRO were trying to put it in, they would
20 say, well, Seagate says you have to look at prefiling
21 conduct. That is the first point.

22 The second point is in the Datascope case the same
23 issue was raised. It is cited on Page 13 of our brief. In
24 that case the Federal Circuit had ruled two to one in favor.
25 The court said, "The district court's reference to this

1 court's two-to-one decision affirming the judgment of
2 liability, was inappropriate in this case. The decision was
3 rendered several years after the date the infringement
4 began." The date -- "(i.e., the date employed in determining
5 willfulness under the circumstances of this case), and was
6 based on facts unrelated to the decision on the critical
7 date." So the problem with this is that it happens later.

8 As far as the Buffalo decision, as you know, Your
9 Honor, the only reason the Federal Circuit sent it back was
10 because Mr. Coddington at the very last second withdrew his
11 agreement that the Court could decide the issue; and as Mr.
12 Ritchey I believe pointed out earlier, if the rule is that any
13 case in which you are not entitled to summary judgment, if
14 there is any question of fact, there can be no willfulness.
15 That will essentially eliminate willfulness from mostly all
16 cases.

17 As far as the reexamination, Your Honor -- and I did
18 want to mention this, you said you were going to take it under
19 advisement and I would like to make a parenthetical remark
20 here. We were served with a number of the cases, two cases
21 that Counsel quoted last night late in the afternoon. If Your
22 Honor is going to take the reexam under advisement we would
23 like an opportunity to submit a short reply on that.

24 THE COURT: When can you have that to me?

25 MR. FURNESS: Tuesday or Wednesday of next week.

1 THE COURT: I'm going to rule on it by tomorrow.
2 You can submit it by Tuesday if you want to.

3 MR. FURNISS: We can do it -- we are flying today,
4 Your Honor. Could we have until Monday?

5 THE COURT: All right. Monday then.

6 MR. FURNISS: Thank you, Your Honor. I appreciate
7 that very, very much.

8 THE COURT: Monday --

9 MR. FURNISS: Monday noon?

10 THE COURT: 10:00 a.m.

11 MR. FURNISS: 10:00 a.m.

12 THE COURT: Central time.

13 MR. FURNISS: Central time. Thank you, Your Honor.

14 THE COURT: I believe that is, what, 7:00 --

15 MR. FURNISS: It's 8:00 a.m., Your Honor.

16 THE COURT: 8:00. Okay.

17 MR. FURNISS: It is the middle of the night in
18 Australia. Just joking. As far as this is concerned, it is
19 what happens before the lawsuit is filed, not what happens
20 years and years and years later. So both of these things do
21 not make it objective.

22 Now, the question of willfulness, as Your Honor
23 knows, turns on the evidence of infringement, and the jury
24 should hear that because it is a question of fact. And
25 whether the objective test is met is going to be decided when

1 the evidence is heard. Now, in taking depositions, none of
2 the defendants provided an opinion of counsel; and when they
3 were asked what they did, there is virtually nothing there.
4 None of them presented any evidence or analysis. They just
5 said we thought about it and decided it wasn't invalid and we
6 weren't infringing.

7 And the lack of evidence, that is a detailed issue
8 we didn't pile up in front of the Court because it is a lot of
9 deposition testimony. But the bottom line is that none of
10 them have an opinion of counsel and none of them have any good
11 reason other than the fact that they felt from economic
12 reasons that they weren't infringing or the patent wasn't
13 valid. There is no actual that -- evidence anybody did any
14 research.

15 In Intel's case in particular, it seems to me there
16 is an admission in the record because Intel looked at Radiata
17 in 1999 -- and we presented these documents. They are in our
18 papers. They looked at Radiata to possibly buy it, which was
19 a spin-off from CSIRO using the CSIRO technology, and they
20 decided -- there was evidence in there saying that they were
21 put on notice that CSIRO had a patent. Radiata told them
22 CSIRO has a patent on this. Their response was, well, we
23 never investigated it. They even cited their witness Saltzman
24 to say we never investigated the patent, so we didn't really
25 know.

1 That is the essence of recklessness. That is the
2 essence to be put on notice that there is a patent and to do
3 absolutely nothing about it. And that is what they did from
4 1999 until apparently 2003 when they put together the Common
5 Interest Group. So that kind of evidence prefiling is what is
6 relevant, and what happened in 2008 or 2009 is not.

7 THE COURT: Final word.

8 MR. VASQUEZ: Yes, Your Honor, two small points.
9 Number one, Mr. Furniss spent most of his time talking about
10 the subjective elements, and he is not addressing because
11 there is not a good answer for why any of the individual
12 state-of-mind evidence is at issue when you look at the
13 objective tests. That is the import of these authorities.

14 Secondly, it is a parlor trip to suggest that the
15 events of recognition by the FCA or the PTO of the substantial
16 questions of patentability or these triable issues of fact
17 occurred after the litigation and so they don't count. These
18 are recognitions by official bodies about a fact that existed
19 on the day they filed the patent. On the day they filed the
20 patent there was prior art that predated it.

21 The analysis contained in the FCA opinion that says
22 Rault plus Wilkinson or the other combination, that they
23 present this question of obviousness, that was presented on
24 the day they filed the patent. They did not submit all of
25 these authorities to the PTO, so the PTO didn't recognize it.

1 But it was a fact then in existence, and there is no case that
2 says that you cannot consider the fact of late recognition by
3 a Court of Appeals when the issue finally goes up.

4 THE COURT: All right. I'm going to deny the motion
5 for summary judgment as to no willfulness. We will -- I think
6 there is a fact issue there, but I will hear the testimony and
7 I will certainly leave it open to considering a motion for
8 JMOL or directed verdict.

9 MR. VASQUEZ: Thank you, Your Honor.

10 THE COURT: I will take it up at that time.

11 All right. CSIRO's motion with regard to the RAND
12 defenses, Docket No. 382 in the 549 case, 448 in the 550 case,
13 and 330 in the 551 case.

14 MR. FURNISS: Yes, thank you, Your Honor. CSIRO has
15 a statutory right to a reasonable royalty, and it is a
16 statutory right created by Congress, so there is lots of good
17 law that says that right can only be specifically and
18 expressly waived. CSIRO gave a letter to the IEEE in 1998.
19 It was on a form provided by the IEEE.

20 And if we can get the slides up with the IEEE
21 letter.

22 And it says, "In the event the proposed standard is
23 adopted and the standard cannot be practiced without the use
24 of the patent referenced above, CSIRO agrees upon written
25 request to grant a non-exclusive license under such patent on

1 a non-discriminatory basis on reasonable terms and conditions,
2 including its then-current royalty rates."

3 Now, the interpretation of that -- it is agreed by
4 their expert -- they later tried to avoid that on Mr.
5 Rosenthal that, well, it is not just a contract. But they say
6 but what is it? If it is not a contract, what is it? We
7 agree that it is a third-party contract, but it is
8 unambiguous. They said it was unambiguous. It is unambiguous
9 on its face. And the interpretation of an unambiguous
10 agreement under Texas law and under New York law -- there was
11 a question of what law you would apply. The letter actually
12 went from Australia to the Netherlands because the chairman of
13 the committee was in the Netherlands.

14 We looked at California law, we looked at -- well,
15 we looked at New York law because that is where the IEEE is.
16 We looked at Texas law, and they are all exactly the same. An
17 unambiguous contract is a question of law for the Court.
18 So --

19 THE COURT: Let me ask defendants if they agree it
20 is unambiguous?

21 MR. VASQUEZ: No.

22 MR. FURNISS: I am wondering what the ambiguity is.

23 THE COURT: What is the ambiguity?

24 MR. VASQUEZ: To the extent they contend that the
25 plain meaning that we see in the words and our witnesses have

1 testified about, there is an ambiguity by the mere fact that
2 two people look at the sentence and believe that it means
3 different things. For instance, Mr. Furniss has indicated
4 that the phrase "reasonable" is meaningless. We have
5 witnesses that can come on in the context of trade usage,
6 which is allowed under the evidence, which will allow the
7 Court to be able to make a decision on what "reasonable" meant
8 under these circumstances. That is one.

9 They also try and hinge together multiple conditions
10 precedent in the clause that they have. This is not a form
11 agreement that Mr. Furniss just characterized it. This is a
12 letter cut from whole cloth by CSIRO. If you'd look at it,
13 you can see that. But the IEEE sent a request with their
14 rules, and Mr. Furniss at this date is trying to argue that
15 the particular methods by which CSIRO changed the form letter
16 allow him to have cover. In essence he says it allows us to
17 contend we didn't make a promise. It allows us to contend
18 that if we did make a promise, we could change the rate at any
19 time we wanted.

20 When he argues that this inclusion of the language
21 that says "including its then current royalty rates," he next
22 argues that if on Tuesday we offered it for six cents to Cisco
23 Systems and on Wednesday we changed the rate to four dollars,
24 we didn't violate our promise. Those are the types of issues
25 that arise in connection with the RAND case, Your Honor. And

1 in particular when they adopt a characterization that is at
2 odds with what the witness from the IEEE who promulgated the
3 policy, the witnesses whose job it was to send out the letter,
4 the witnesses who received the letter, the witnesses from the
5 industry that received a reiteration of those promises, not
6 for just "a" but for the "g" standard also, all of that bears
7 on the issue of whether their preferred construction on this
8 document is tenable.

9 MR. FURNISS: Where to start? We don't contend that
10 "reasonableness" doesn't -- is meaningless. "Reasonable"
11 means reasonable. It is in the statute. It is in the
12 Congressional statute that the patentholder is entitled to a
13 reasonable royalty. What they need to do to make this
14 argument is to get Rosenthal to say "reasonable" means very,
15 very low or zero. It is a bizarre interpretation. There is
16 absolutely no support for it anywhere.

17 Now, Mr. Vasquez says that CSIRO changed this
18 letter. Absolutely untrue. It plugged in its name and its
19 patent number. But this letter was drafted by the IEEE, and
20 the IEEE says "reasonable" means reasonable. And "reasonable"
21 is the same standard.

22 Secondly, CSIRO was reasonable, Your Honor. We made
23 an offer to all of them. That offer was based on independent
24 third-party advice, and they cut it more than in half before
25 they made it. They made a reasonable offer to all of these

1 defendants, and they all said, sorry, we don't even want to
2 talk to you.

3 THE COURT: What was the offer?

4 MR. FURNISS: It was a 1.90 per unit trending down
5 to 1.40 for volume, and it was negotiable.

6 THE COURT: What was the Radiata?

7 MR. FURNISS: Well, the Radiata was a percentage of
8 the chip price, but Radiata was not a patent license, Your
9 Honor. It was a development agreement. It required Radiata
10 to use its best efforts to raise money. It required them to
11 sell 10,000 units by December 31 of 2001, and it was more than
12 a year -- it was eight months prior to this letter. So when
13 this says "then current royalty rates," that doesn't mean your
14 royalty rates that you gave three months ago or five months
15 ago. It is as if you said that a baseball player who signed a
16 rookie contract couldn't make any more money --

17 THE COURT: Did you have other current royalty rates
18 prior to this letter?

19 MR. FURNISS: Oh, no, Your Honor. At the time of
20 the Radiata agreement the technology was in development.
21 There was no market for it yet, it hadn't been proven
22 commercially feasible. The Radiata agreement is just a
23 totally distinct agreement. It is not a bare patent license
24 at all. And Radiata raised money and created a commercial
25 chipset, and Cisco bought them. So it is five years before

1 the hypothetical negotiation.

2 Now, the other point, of course, is that even if you
3 could say "reasonable" means very, very low, there is no
4 evidence that CSIRO had that knowledge. They thought
5 "reasonable" meant reasonable, which is probably a reasonable
6 thing to think. There is no evidence anywhere -- the IEEE in
7 2008 said we take no position on the meaning of the word
8 "reasonable."

9 And the very authorities they cite, cited by Mr.
10 Rosenthal and cited by the defendants -- Mark Lemley, who is
11 quite well-known in this area, virtually no SSO policies --
12 which is Standard Setting Organizations -- specify that the
13 phrase "RAND" means leaving Courts to decide what terms are
14 reasonable. Swanson and Baumol, another article in the
15 "Antitrust Law Journal" it is widely acknowledged that there
16 are no generally-agreed tests to determine whether a
17 particular license does or does not satisfy a RAND
18 commitment.

19 The IEEE posts on its website a letter from the
20 VP -- the late VP of general counsel of Hewlett-Packard Mr.
21 Fromm who says the term "RAND" is without meaning. He means
22 it means only reasonable, it doesn't have any specialized
23 meaning. So CSIRO complied with his obligation as to "a" and
24 the obligation isn't as to anything but "a"; and because
25 statutory rights are not rightly waived, there is simply no

1 basis on which to extend it beyond the terms of "a" even if
2 there were a definition of "reasonable" that is other than
3 reasonable. Our view is "reasonable" means reasonable. That
4 is what the jury is going to decide. That is what it should
5 mean. To try and give words new meaning --

6 THE COURT: What royalty rate are you going to be
7 asking the jury to apply?

8 MR. FURNISS: Either four dollars or five dollars,
9 Your Honor, per unit.

10 THE COURT: Okay. Response?

11 MR. VASQUEZ: Sure, Your Honor. This is a motion
12 for summary adjudication. It is an improper motion for
13 summary adjudication because the plaintiff admits that there
14 are all these factual disputes. Virtually everything Mr.
15 Furniss has said about the IEEE is in dispute in this case.
16 For instance, when he says it is IEEE policy not to talk about
17 royalty rates or not to specify, that is simply not true. By
18 this motion he is seeking to exclude that evidence before the
19 Court sees it. When there is a triable issue of fact because
20 there are two competing pieces of admissible evidence, you
21 can't grant summary judgment. That is axiomatic.

22 Let me tell you a little bit about the question you
23 asked which is you asked about the Radiata license. The
24 Radiata license was first enacted the very year that this
25 promise was made, 1998. That is the Radiata license. So if

1 you get that, you understand that when they made this
2 commitment their then current rate was what I simplify as
3 being six cents. That is because through discovery,
4 unbeknownst to any of the defendants, there was a six-cent
5 deal made with first Radiata, a chipmaker and then with the
6 biggest network company in the world Cisco Systems, which was
7 then extended to another chip maker, which is the defendant in
8 this case Marvell. Then extended to STMicro, another public
9 entity. Then extended to Sharp, a consumer electronics
10 company from Japan. And then extended to SkyPilot, a
11 competitor of my four clients.

12 That particular six-cent deal started in 1998, was
13 reiterated to Cisco in 2001 the year that the 802.11a standard
14 went into effect, reiterated in 2003 the year the 802.11g
15 standard went into effect. Now, CSIRO is attempting to argue
16 without credible evidence on a motion for summary adjudication
17 that its then current rates language asserted not from the
18 IEEE but from CSIRO's mouth, that that allows them to change
19 this rate under different circumstances. Clearly six cents
20 and four dollars are two different things.

21 In addition, the evidence is very clear that, for
22 instance, when Accton negotiated with CSIRO -- and this is
23 under oath by both sides of the equation. The head of
24 licensing at CSIRO admits this and the Accton person admits
25 this, there was talk of a dollar royalty. In that discussion

1 CSIRO's licensing head was asked was Accton taking a
2 reasonable position? And he said that they were reasonable in
3 that discussion. Now, when you have these conflicting facts
4 about what "reasonable" is, you can't grant the motion for
5 summary adjudication.

6 Now, when Mr. Furniss said that the RAND commitment
7 was made five years before the hypothetical negotiation, I
8 think I have laid out the timeline. But the hypothetical
9 negotiation is not at issue in the RAND case. You have
10 decided that the Georgia-Pacific case will come in June and
11 that the RAND case will come in two weeks. And so we need to
12 deal with the RAND case and push aside the Georgia-Pacific
13 case. But if you were looking at it and later if they renew
14 this motion, the issues that deal with RAND are going to be
15 somewhat relevant. The same facts as Mr. Van Nest indicated
16 to you are going to have to be put forth to the jury because
17 Mr. Rosenthal is testifying on issues 1 through 5 in
18 Georgia-Pacific and issues 14 through 15 on Georgia-Pacific
19 because of the commonality of these two sets of issues.

20 THE COURT: Okay. Thank you. The motion for
21 summary judgment, CSIRO's motion as to the RAND defenses is
22 denied.

23 MR. VASQUEZ: Thank you, Your Honor.

24 THE COURT: Next is CSIRO's motion of non-validity
25 as anticipated are obvious, Docket Nos. 380 in the 549 case,

1 447 in the 550 case, and 329 in the 551 case.

2 MR. FURNISS: Yes, Your Honor. The issue on
3 anticipation is that none of the references that are cited in
4 defendants' meet this Court's claim construction, and really
5 they are trying to argue claim construction over again. The
6 first reference --

7 If we can get to Slide 2.

8 The date, the priority date issue is -- the priority
9 date -- there is undisputed evidence that the priority date is
10 no later than March 12th of 1993. Now, defendants argue on
11 this, but there is simply no evidence to the contrary. It is
12 just attorney argument. On March 12th of 1993 CSIRO provided
13 a copy of what is called its "Flying Fox memo" to IBM under an
14 agreement that said that IBM and CSIRO will jointly develop a
15 very high-performance wireless LAN link.

16 And up there on the slide -- and it is too small for
17 my old eyes so yours are probably better than mine, but I did
18 a blow-up just in case. And you can see that the defendants
19 say, oh, well, they didn't disclose in the United States the
20 same invention. And if you look at this block diagram it is
21 very clear they did. All of the key elements -- in fact, this
22 diagram looks very much like the figure that is in the patent.
23 And there is undisputed evidence from the head of IBM's
24 program, that they worked on it through the end of 1993. And
25 there is evidence of continuing -- CSIRO sends additional

1 information to IBM in May. IBM responds with questions in
2 May. There is additional information in August, additional
3 information in October, additional information in November.

4 There is no contrary evidence whatsoever. No
5 witness has said this wasn't disclosed to IBM in the United
6 States. No witness has said they weren't working on it, they
7 paid money, there is a contract. In other words, just saying,
8 well, we disagree doesn't create a triable issue of fact. So
9 with that date, then let's turn to the references.

10 The first reference they use is called the Harris
11 modem. The Harris modem was a high -- was a military modem
12 that was used to bounce signals off the ionosphere for
13 long-distance outdoor communication. There is no doubt about
14 it. And the argument is, well, it was used to train people
15 inside; but it was so strong they had to modify it heavily.
16 But most importantly as Your Honor recognized in the Markman
17 order in this case Your Honor held that indoor was a
18 structural limitation, was a structural limitation. It means
19 it affects the structure of the transceiver.

20 In this case the Harris modem was never intended for
21 indoor use. And to train people indoors because of the
22 weather, they had to put things called attenuators and dummy
23 loads on them, and those tests were done behind lock doors.
24 So it wasn't a public use. It wasn't a transceiver intended
25 for use in an indoor environment; and, in fact, there is

1 undisputed testimony that they had to be very careful because
2 it had a tendency to burn people when they used it inside
3 because it was so powerful. It is an entirely different
4 system. It has these elements in it, but it was not intended
5 for.

6 And Claim 42, as Your Honor recognized in the
7 Markman ruling, says that it is a transceiver for operation in
8 a confined multipath environment. Not something that you can
9 jerry-rig and use in a confined multipath environment.

10 The second reference that is used is the so-called
11 Morris Thesis, and the undisputed evidence is that was not
12 publicly accessible until 1994. If we look -- he says, "Is it
13 correct that you're unaware of your thesis actually being
14 cataloged in any library until 1994? He says, "yes," that is
15 true. That is after the date of the US filing, so it is not
16 prior art. It can't possibly invalidate.

17 They are going to say, well, he gave a copy to an
18 organization called TR Labs in Calgary, but the person who runs
19 TR Labs was asked is there any way for somebody outside of
20 TR Labs to find this? Is there any catalog, any index, any way
21 to find it? She said, not that I am aware of. So there is
22 nowhere to find this document. It is not publicly accessible.
23 And under Federal Circuit law, there were two cases that came
24 down on the same day that involved theses. One was cataloged
25 in the university library and the court said that is prior

1 art, and the other one was not. And the court said it is
2 not. So the second reference Morris is simply not prior art
3 as well.

4 And the third reference has no interleaving
5 structure. Morris has no interleaving structure, as well.
6 Xue -- which is X-U-E -- has no interleaving structure, and it
7 is too late as well because there is no evidence that it was
8 publicly available, but it is different as well. All of those
9 are undisputed facts, admitted facts.

10 For example, the defendants' experts admit that
11 Xue -- X-U-E, no one has figured out exactly how to pronounce
12 that name -- used a block encoder, and a block encoder does
13 not meet this Court's claim construction, so it cannot
14 possibly anticipate because it doesn't meet the Court's claim
15 construction and it doesn't have an interleaving structure and
16 it doesn't have an encoding structure either. It just
17 mentions in writing block encoding, which Your Honor has held
18 is not sufficient.

19 So none of these references come close. And it
20 would be -- we have a related motion that the defendants would
21 have to make a foundation, but they cannot make a foundation
22 as to any of these to get them in. And it would be error to
23 admit them because they don't meet the requirements as to
24 priority date and the Court's claim construction.

25 THE COURT: Response?

1 MR. VAN NEST: Yes, Your Honor. There are just a
2 whole big bundle of facts that address -- or that are relevant
3 to each of these issues, and I will just take them one at a
4 time and very briefly.

5 On the priority date issue, they have the burden of
6 showing that they are entitled to a date before November of
7 '93 when they applied for a patent here in the United States.
8 That is their burden to show. The March '93 submission to IBM
9 doesn't get them there. It has no disclosure of the structure
10 for DRE, the 1/2 rate TCM encoder; and even in the diagram
11 that he handed up, you have got an FEC decoder. It appears
12 that they were using at that point a convolution encoder.
13 There is no reference to TCM anywhere in this document,
14 number one.

15 Number two, there is no indication that this
16 document or this configuration was anything other than a
17 preliminary design study. That is what it is called. It is a
18 preliminary design study. It wasn't limited even to
19 multicarrier modulation, the OFDM that is clearly an element
20 of the '069 patent. As a matter of fact, we submitted, Your
21 Honor, two subsequent memoranda -- they are listed at Exhibits
22 H and M -- showing that what they were actually testing here
23 was not multicarrier modulation but, in fact, single carrier
24 modulation.

25 They were approaching -- this now after they had

1 filed in Australia, before they had filed in the United States
2 they still weren't sure, they still weren't sure what kind of
3 modulation they wanted. They still weren't sure what sort of
4 DRE structure they wanted. So there is absolutely a failure
5 of proof on the issue of whether or not this was a disclosure
6 of the invention.

7 The other key issue that remains a question of fact
8 is, were they diligent? When all they have is a preliminary
9 design study, they have to show diligence. Well, that
10 diligence has to be diligence in creating the invention here
11 in the United States. The Patent Code at Section 104 says
12 activity outside the U.S. is completely irrelevant. All they
13 have shown is that engineers in Australia were working on a
14 variety of designs, a variety of approaches, not the
15 invention. Therefore, summary judgment is inappropriate. It
16 is a question of fact whether the priority date is November
17 '93 or March of '93 as they are contending now.

18 By the way, Your Honor, I would note just in
19 addition, they never mentioned this date in discovery. We
20 asked them in a specific interrogatory, what dates do you
21 contend are your priority dates earlier than November '93?
22 This date was never provided. They talked about the
23 Australian application in '92 -- which they are apparently now
24 abandoning -- but this was never identified in their
25 interrogatory. So that is just another reason to deny the

1 motion.

2 On Harris he says, gee, it is undisputed that it
3 wasn't for indoor use. Well, we have two declarants, two
4 witnesses who will be called in the trial that says it was.
5 Dave Luhowy -- L-U-H-O-W-Y -- wrote an article. He is really
6 the inventor of the Harris modem, and he is prepared to
7 testify, that as he has in a declaration, that the Harris
8 modem was designed to work outdoors and indoors over long
9 ranges and short ranges and under a wide variety of conditions
10 and channel interference. "In fact, I remember the modem
11 being used indoors in our test facilities using all of the
12 various settings." That is Luhowy.

13 John Liner, who worked originally for the military
14 and then became a salesperson for Harris. He testifies that
15 he repeatedly tested the device indoors, trained customers on
16 the device, demonstrated the device.

17 Thirdly, we have asked Dr. Wicker to test the device
18 indoors. He has tested it. It works indoors. So not only
19 does it inherently operate indoors, we have two witnesses and
20 a plethora of documents to show it was intended for that use
21 and was used in that way.

22 On Morris I am surprised to see this raised. Your
23 Honor already denied summary judgment on Morris. Remember
24 this is the one that they have been desperate to keep out,
25 they moved to strike it, they claimed we defrauded them. Your

1 Honor issued an order -- it is Document 414 -- on January 27th
2 of 2009 denying summary judgment on this publication issue.
3 You said, "After carefully reviewing the parties' submissions,
4 there are numerous material fact issues concerning the Morris
5 Thesis and the circumstances surrounding its publication. The
6 parties are free to make their excellent factual arguments at
7 trial. Summary judgment is denied." So the issue of
8 publication has been resolved. There are questions of fact on
9 that.

10 He mentioned that -- or claimed that Harris doesn't
11 describe interleaving. Well, his thesis does describe
12 interleaving. Not only that, their expert pointed out that
13 one of skill in the art could build an interleaver based on
14 what was disclosed. That is testimony from Dr. Monsen in
15 Exhibit 2 attached to our opposition. So their expert is
16 saying you could build it based on what was there. It clearly
17 discloses interleaving techniques and shows where in the
18 device it would be done. So there is no question of fact
19 about that.

20 The publication issue on Xue is easily resolved.
21 The Xue Wilkinson reference has a date stamp on the cover of
22 it that it was provided to the library a month or a month and
23 a half before the application was filed in the United States.
24 That is at Exhibit 13. And Dr. Wilkinson is going to testify
25 that that article, which he is an author of, was shown,

1 disclosed, and passed out at a conference a month and a half
2 before the patent was applied for. That is at Exhibit 24.
3 And that that conference was attended by people interested in
4 wireless LAN who not only heard the presentation but saw the
5 article.

6 With respect to interleaving on the Xue article,
7 again, it is the same thing. This was a quibble on their
8 part. Interleaving was well-known, as the Federal Circuit
9 pointed out. Their expert admits anybody could build an
10 interleaver. They are claiming that all interleaving is the
11 same. Di-bit interleaving, bit-by-bit interleaving, it really
12 doesn't matter. That is their contention. There is clearly
13 disclosure in Xue of interleaving, and their own expert admits
14 that anyone could have built it.

15 THE COURT: Okay. Thank you, Mr. Van Nest. I think
16 that is enough. Defendants' motion for summary judgment as to
17 the RAND defenses is denied -- I'm sorry, as to anticipation
18 and obviousness is denied.

19 MR. VAN NEST: I'm sorry, Your Honor. You mean
20 plaintiffs' motion?

21 THE COURT: Yes, plaintiffs' motion as to -- not
22 invalid as to anticipation and obviousness is denied.

23 Mr. Furniss, do you care to argue infringement or
24 inequitable conduct?

25 MR. FURNISS: Just infringement, Your Honor. I

1 perceive a trend here, Your Honor; however, I think this one
2 has some legs.

3 THE COURT: How many?

4 MR. FURNISS: I guess the answer would be, enough.

5 Your Honor, in your Markman order in this case in
6 discussing the Buffalo situation, the Court said that, while
7 Buffalo had contended that a 1/2 rate TCM encoder was
8 different than a 1/2 convolutional encoder, what was missing
9 was any reason why. And on this one I think it is very
10 important. Dr. Monsen, Dr. Andrews from UT, and Dr. Negus
11 have all testified that a 1/2 rate TCM encoder is a particular
12 case.

13 TCM encoders is a group of concepts. There are
14 different rates. You can have a 2/3, you can have a 4/5; you
15 can have many different types. But in the 1/2 rate they have
16 all testified that the mapper does not provide any additional
17 functionality, any additional data reliability enhancement in
18 the 1/2 rate.

19 Now, none of the defendants' experts were willing to
20 discuss a 1/2 rate. All of the testimony -- and I will ask
21 Mr. Van Nest if I am wrong show me where it is -- no one says
22 you get better data reliability enhancement out of a 1/2 rate
23 TCM than out of a 1/2 rate convolutional encoder. We know
24 that a convolutional encoder is traditionally part of a TCM.
25 In fact, Dr. Wicker says that people often call TCM encoders

1 convolutional encoders. He said that in his book. That is
2 what people understood.

3 The key issue is whether it operates differently,
4 and that is what Your Honor said. None of their experts ever
5 said that a 1/2 rate TCM encoder performed any different
6 function. There are -- all of CSIRO's experts have said
7 correctly that with a 1/2 rate convolutional encoder, there is
8 one bit in and two bits out; and that in a 1/2 rate TCM
9 encoder, there is one bit in and two bits out. So you can't
10 create a question of fact unless you meet that fact.

11 None of their experts -- Dr. Williams in his
12 testimony pretended -- when he was asked about a half-rate TCM
13 encoder he pretended to not know what it meant. I don't
14 understand your question. So no one has ever made any showing
15 there is any difference, and we made a very specific showing
16 that it has no different function. It doesn't increase.

17 Now, that is not to say there might not be some
18 other type of convolutional encoder that might make a
19 difference, but that doesn't matter. What the Court said was
20 it was a 1/2 rate TCM encoder, and there is no contrary
21 evidence. There is just a bunch of -- they are just going to
22 try and confuse the jury who will not understand convolutional
23 encoding. Your Honor might. But even I don't really.

24 And it is just mumbo-jumbo to say, well, TCM
25 encoders generally might add some; but in this specific case

1 there is undisputed testimony and there is nowhere, none of
2 them ever specifically said you get better data reliability
3 enhancement with a half-rate TCM than you get with a half-rate
4 convolutional encoder, and that is why there is no disputed
5 question of fact. As Your Honor knows, it has to be a
6 material fact that is disputed, not some other fact. And the
7 fact that they would never address the half rate is because
8 they couldn't.

9 And their main expert Dr. Wicker, who is an expert
10 in convolutional encoding, wouldn't give an opinion on it at
11 all in his deposition, wouldn't give an opinion on it. And
12 the reason is because he can't because it is not true. In
13 reality a half-rate TCM encoder is exactly the same.

14 If we can show the diagram. One bit in, two bits
15 out. There is no mapping function. It makes no difference
16 whatsoever. They haven't controverted that.

17 Now, on the other two issues they are simply
18 rearguing Your Honor's claim constructions. We have already
19 found that you ruled bits equals blocks and, therefore, you
20 can interleave by single bits. They are just rearguing that.
21 That was affirmed. It was a matter of claim interpretation,
22 so it was for the Court. The Federal Circuit affirmed it. It
23 is not a question of fact. It is a question of law. It has
24 already been determined.

25 And the third -- they only have three

1 noninfringement arguments. The third one is that 4,000
2 nanoseconds isn't enough. It is just a rehash of the
3 indefiniteness argument -- which Your Honor denied -- that it
4 is possible that somewhere there could be a signal that was
5 significant multipath that was more than 4,000 nanoseconds.
6 Now, light travels at one foot per second more or less. And as
7 one of their own witnesses, their own witnesses said, well,
8 that would be a room a kilometer -- almost a kilometer in size
9 to have that kind of delay.

10 So the fact is as Your Honor recognized in the
11 Markman order, the IEEE standard sets the delay period two
12 orders of magnitude greater than their expert Dr. Rappaport
13 said was the maximum amount of delay spread he found; two
14 orders of magnitude greater. So it is a purely -- it is just
15 not a credible argument and creates no question of fact that
16 would prevent summary judgment. This one is really undisputed
17 because they can't dispute the fact that a half-rate TCM and a
18 half rate convolutional encoder, they are not just equivalent,
19 they are the same, exactly the same.

20 THE COURT: Response?

21 MR. CORDELL: Thank you, Your Honor. Well, I
22 understand Mr. Furniss believes they are the same, but the
23 evidence shows otherwise. The evidence shows, in fact, there
24 are substantial differences between a half-rate TCM encoder
25 and a convolutional encoder, and I would like to address it in

1 three ways. There are structural differences, there are
2 differences in the way they operate, and there are differences
3 in the results they achieve. That is what the law tells us we
4 have to focus on. We have to focus on those kinds of things
5 when we are evaluating equivalents under 112, paragraph 6.

6 I'm sorry, Your Honor, I apologize.

7 (Pause in proceedings.)

8 MR. CORDELL: Mr. Furniss began his remarks by
9 referring to the Buffalo record, and we take direct issue with
10 that. I understand there were findings made in the Buffalo
11 record; but the findings in the Buffalo record were premised
12 on the facts that Buffalo chose to bring into court. And we
13 maintained and have maintained all along that the facts that
14 Buffalo chose were deficient. They essentially stipulated to
15 this idea that a convolutional encoder is part and parcel of a
16 TCM scheme. That is absolutely not true, and we are going to
17 be able to demonstrate that not just through my words but
18 actually through the CSIRO expert. He has admitted that.

19 I will address briefly the three elements that Mr.
20 Furniss went through, and I would like to touch just briefly
21 if I can on the idea that -- particularly in the summary
22 judgment context, CSIRO hasn't achieved anything close to a
23 prima facie showing of infringement here. So the reality is
24 that, in fact, Your Honor, we don't have the Buffalo record.
25 We have done a lot of leg work in digging up the real facts to

1 show exactly the way these devices work. The patent is almost
2 silent on what that trellis-coded modulation scheme looks
3 like.

4 So we have gone the extra mile to disabuse the
5 record of the hearsay concessions that Buffalo made; and,
6 frankly, the very premise of ultimately what became the
7 Federal Circuit's findings turn out to be not true. It is
8 important to realize in this case, unlike in Buffalo, we are
9 not talking about a preponderance of the evidence standard.
10 Mr. Furniss has to show there is no possible jury that could
11 go his way on these issues, so I really have the wind behind
12 me on this one.

13 Let me jump on the "means to apply data reliability
14 enhancement." You will recall, Your Honor, this was a
15 means-plus-function claim. The Court construed it properly as
16 a rate 1/2 TCM trellis-coded modulation encoder. Didn't say
17 convolutional encoder. Didn't say some other finite-state
18 encoder. The claim construction was very clear. Twice the
19 Court rejected CSIRO's attempt to reinterpret that limitation,
20 to reinterpret the DRE means as a simple convolutional
21 encoder.

22 There is no dispute that, in fact, the Court
23 correctly recognized that those two structures are different.
24 A convolutional encoder is not the same thing as a TCM
25 encoder, and it turns out there are differences in the way

1 they work and in the results they achieve. Start with the
2 fact that a TCM encoder is a single integrated structure. It
3 is one thing done. It is done in concert so that the encoding
4 and the mapping happen essentially simultaneously to achieve
5 better results. There is a fact that we have been able to
6 develop that the TCM encoders that are talked about in the
7 patents are things called "systematic encoders."

8 What does that mean? That means that one of the
9 bits that comes in gets out unchanged, so the output of the
10 systematic encoder is always going to have one or more bits
11 that had appeared on its input. That is not true with the
12 convolutional encoders that are accused here, Your Honor. The
13 convolutional encoders are not systematic. None of the bits
14 that are input make it to the output. They are all modified
15 by the convolutional encoder.

16 We also have evidence supported by all of the
17 experts -- I take issue with Mr. Furniss's statement that we
18 didn't put in evidence showing that a TCM encoder is better,
19 that gets you better data reliability enhancement than a
20 convolutional encoder. All of our experts spoke to that. But
21 if there were any doubt, if there were any doubt about whether
22 or not it is better, we can look to two places. One, we can
23 look to Mr. Monsen, the CSIRO expert who admitted that, in
24 fact, you can make a TCM encoder using things other than a
25 convolutional encoder. He has disabused the record now of

1 this fundamental assumption that whenever you see TCM you
2 automatically find a convolutional encoder.

3 This is his admission I have at Slide 9, and I will
4 read it into the record. The payoff -- this was a number of
5 the questions that we have in the briefing. "But the payoff
6 was right, you can build the TCM without necessarily using a
7 convolutional encoder, correct? " "A. That's correct."

8 So even apart from all of the other testimony that
9 we have on our side of the case, we have their expert saying
10 for the first time that a convolutional encoder is not the
11 same thing as a TCM encoder; that you can have TCM without
12 convolution. And that is very, very important.

13 There are differences in the way they operate. When
14 we get to the data reliability enhancement of the TCM encoder,
15 we realize that they do things fundamentally different. It is
16 the output of the TCM encoder are these symbols that the Court
17 has heard so much about. And the experts have all told us
18 that the symbols that come out of a TCM encoder are reflective
19 of the particular arrangement of the data and the way that it
20 was processed and mapped simultaneously. When that happens
21 you maximize this thing called Euclidean distance. In the
22 convolutional encoding case we talk about Hamming distance.
23 Again, I mentioned this systemic -- or systematic finite-state
24 encoders used with TCM that -- where the output will include
25 the input bits.

1 Convolutional encoders simply enhance data
2 reliability by increasing the number of bits. They add
3 redundancy, and that is a problem in communications because
4 when you add redundancy you create a bigger load that you have
5 to carry. There is more data that has to be transmitted.
6 Again, I mentioned earlier that -- the Hamming distance
7 differences and the fact that the convolutional encoders are
8 non-systematic.

9 Now, let me get to Mr. Furniss's point because he
10 said there is no evidence that TCM encoders are better than a
11 mere convolutional encoder. We absolutely don't agree with
12 that. At Slide 12 I have a number of cites out of the brief
13 that show that. But we don't even have to go there, Your
14 Honor. We don't have to go to the experts because the patent
15 itself tells us this. The patent itself at Column 9, Lines 36
16 through 46 talk about the use of a conventional forward error
17 correction scheme, such as, but not restricted to,
18 Reed-Solomon or convolutional encoding.

19 So it sets it up. It tells us that is one thing
20 that could be used. It then tells us immediately in the same
21 column just below that it, it is also possible to use combined
22 coding and modulation schemes, such as trellis-coded
23 modulation, TCM, to give improved bandwidth efficiency and
24 improved error-correction capability. We don't have to go to
25 extrinsic evidence at all. It is right here in the patent.

1 It is right here in the patent that a TCM encoder is better
2 than a convolutional encoder.

3 That results -- that ends up giving you a different
4 result, Your Honor. The output of a TCM encoder is modulated.
5 A convolutional encoder is not. There is no evidence in this
6 case that you can replace the TCM encoder of the patent with a
7 convolutional encoder. We speak of replaceability as being
8 one of the hallmarks of equivalents in 112, paragraph 6. No
9 evidence in this case whatsoever that is true.

10 At the end of the day, Your Honor, what you have on
11 the data reliability enhancement means is a fact issue. We
12 have all of the points on our side when we say it is different
13 structurally, it functions in a different way, it achieves a
14 different result. And I understand Mr. Furniss's evidence, he
15 is not going to lay down on that. He is going to push back.
16 That amounts to a fact issue. This is simply not a summary
17 judgment case.

18 If I could just touch on the other two limitations
19 briefly. The means for interleaving data, Your Honor, are
20 tied back to the data reliability enhancement means in that,
21 recall that the output of the structure, the TCM encoder is a
22 two-bit symbol, and that two-bit symbol are like puzzle pieces
23 and they fit together. As they fit together, you can't simply
24 break them apart and expect to obtain the data reliability
25 enhancement that you have just achieved by forming the

1 symbol.

2 So what the patent tells us and the construction
3 that this Court reached, is that the corresponding structure
4 for the means for interleaving blocks of data was a di-bit
5 interleaver. There is no surprise to that because, again, the
6 output of the TCM encoder is this two-bit symbol. You have
7 got to have a di-bit interleaver or you can't preserve the
8 data reliability enhancement you just achieved using the TCM.

9 So just to illustrate it a bit -- and I won't
10 belabor this, but we have done a little animation where we
11 show the output of the TCM putting out these two-bit symbols.
12 And the Court can see they are sometimes triangles, sometimes
13 are squares; but they fit together like puzzle pieces in very
14 particularized ways. And the reason why they do that, the
15 reason why the TCM case gives you better data reliability
16 enhancement is they are maximizing how distinct these two
17 symbols are from one another.

18 We use the analogy that the military uses acronyms
19 instead of simply letters to represent grid coordinates.
20 Instead of saying, you know, "BC" on a map which might get
21 somebody bombed because they hear "PC" you say Baker, Charlie
22 because it allows the listener a better chance of receiving
23 that information and understanding what it is. The same is
24 true with the symbols output by a TCM encoder. They are these
25 particularized symbols that are chosen for their

1 distinctiveness.

2 The way these are interleaved in the patent is to
3 put them on different channels and ensure that they -- that
4 following a very particularized sequence the interleaving
5 takes place so that the entire symbols are transmitted one at
6 a time. We see that in the animation. It will repeat a
7 couple of times. That can't be the case if what we do instead
8 is abandon that for bit-by-bit interleaving. The standard,
9 the accused systems in this case, it is undisputed, use
10 bit-by-bit interleaving. And the standard tells us that it is
11 done using adjacent coded bits being mapped onto non-adjacent
12 sub-carriers. It is a fancy way of saying that every single
13 bit is mapped individually onto adjacent -- non-adjacent
14 sub-carriers.

15 So what the standard talks about is taking each bit,
16 destroying any relationship that they might have to their
17 neighbors and interleaving them one at a time in some fashion
18 so that none of the original pairs are preserved. That is all
19 it means. As a result when this is done in practice, when the
20 accused devices actually do this, they store the bits in a
21 memory unit and then they are mapped out in a different order
22 so that you accomplish this interleaving. But, again, there
23 is no pairing of the bits. There is no symbols that are
24 preserved, so I will look to the animation here. But it will
25 eventually show that the bits were taken out of order and they

1 are put out on a line intentionally to break up any
2 relationship in time between the bits.

3 Now, what would happen if you -- what would happen
4 to that if you did it to a symbol? So I will try to get ahead
5 if I can. Here are the symbols that are output by a TCM
6 encoder. Again, the two puzzle pieces fit together. Part of
7 the data reliability enhancement is the fact that they relate
8 to one another. If you did that using a single bit
9 interleaver, you destroy that relationship. And when you
10 destroy that relationship, you no longer are retaining the
11 data reliability enhancement that you have just achieved. So
12 you can't simply say that a single-bit interleaver is the same
13 as a di-bit interleaver in this particular case because the
14 output of the claimed TCM encoder requires these two-bit
15 symbols. So you end up with a difference in the way and
16 ultimately in the result that is achieved.

17 And then, finally, Your Honor, with respect to the
18 modulation means, I heard Mr. Furniss make an eloquent
19 argument about the Harris modem. He said, you know, Judge,
20 there is no evidence that the Harris modem was ever used
21 indoors. He gave us a fair amount of that. Well, the same
22 could be said about the accused products. So the Court's
23 claim construction was very clear, they have to prove that the
24 period of the symbols have to be longer than a predetermined
25 period that is representative of the time delay of reflected

1 transmission paths of sufficient signal magnitude to impair
2 the reception, et cetera. That has to be done indoors.

3 But the fact is there is no evidence in this record
4 that they have ever done that. None of their experts ever
5 took these systems indoors and began measuring, measuring the
6 symbol period and measuring the reflections and measuring the
7 power of those reflections to know whether or not this
8 impairment takes place. So at the very least, Your Honor, we
9 have a failure of proof on this fundamental issue, the one he
10 told us distinguished the Harris modem on all of the accused
11 products.

12 Finally, with respect to the prima facie case, I
13 will just pause on one -- I just mentioned the confined
14 multipath environment. That is missing from the record.
15 There is also no evidence of any practice of the method Claims
16 68 to 72. But then, finally, there are a whole host of
17 limitations that the parties haven't spent a lot of time on,
18 but we can't forget that CSIRO carries a burden on those. They
19 have got to show that these systems are used, you know, with
20 respect to Claim 10, for example, with a plurality of hub
21 transceivers.

22 That is a not a natural or expected network
23 arrangement. Normally people buy one hub, they stick it in
24 their house, and then they use it. They don't buy four and
25 have them scattered around their homes. So there are specific

1 factual showings that CSIRO has simply ignored.

2 The, finally, Your Honor, there are a number of
3 products that their experts didn't even analyze. We had the
4 debate earlier today about the verdict form, and the thing
5 that struck me about is that CSIRO is asking to put on the
6 verdict form, products that their experts did not even
7 analyze. The Zune is the Microsoft version of the iPod. It
8 is a music player that you carry around with you.

9 When we deposed Dr. Monsen, the CSIRO expert, we
10 asked him what did you do to analyze the Zune? And we got
11 this blank stare back. And we said what -- did you take it
12 apart? What did you do to do your work with respect to the
13 Zune? He finally confessed, Your Honor, he didn't know what
14 the Zune was. He had never seen it. He had never thought
15 about it. And the reality is that is not the way these cases
16 are supposed to go. But particularly on summary judgment they
17 have got to be able to make a factual showing with respect to
18 all of the accused parts, and they simply haven't done it.

19 Thank you.

20 MR. FURNISS: Your Honor, if I may be heard. First
21 of all, with regard to I said in my opening that we needed to
22 hear some evidence that a 1/2 rate TCM encoder was different
23 than a 1/2 rate convolutional encoder. Mr. Cordell didn't do
24 it. They can't do it because it is all theoretical. It is
25 all TCM encoders in general.

1 THE COURT: Let me ask him again.

2 Do you have any such evidence Mr. Cordell?

3 MR. CORDELL: We do, Your Honor. Our experts went
4 through exactly that. And what Mr. Furniss is referring to is
5 the relationship between that Euclidean distance I talked
6 about and the Hamming distance; but the reality is that when
7 the TCM encoder even at half rate does its mapping, it chooses
8 those symbols to maximize the distinctiveness between each of
9 those symbols and those that come after it.

10 Mr. Furniss says, well, the output of those are both
11 two-bit signals. Your Honor, there is nothing, there is
12 nothing that says a two-bit signal is particularly relevant.
13 The idea that there is a two-bit output of both the
14 convolutional encoder in this case and the TCM encoder has to
15 do with the kinds of data communications that we are doing
16 here. That is not a particularly relevant fact.

17 MR. FURNISS: That is a very non-specific response,
18 Your Honor. Our experts say that the inputs and outputs are
19 exactly the same. None of their experts say that the inputs
20 and outputs of a 1/2 rate TCM encoder and a 1/2 rate
21 convolutional encoder are different. They could have, and
22 they won't do it. They would never talk about the 1/2 rate
23 because they know that it is the same.

24 And Mr. Cordell -- you asked him where is the
25 evidence? He is very well-prepared, so where is the evidence

1 that it makes any difference? We have three experts who say
2 it makes no difference. And there is just two bits coming
3 out. It is not a symbol. In the CSIRO there is a mapper
4 later on in the chain. It is a QPSK encoder, so that is later
5 on in the chain. It is not mapped in the 1/2 rate TCM
6 encoder. This is an entirely theoretical argument, and I will
7 say it again, if they can point to any expert who says there
8 is any difference in performance -- that is what Your Honor
9 said he wanted to hear in the Buffalo case, and you didn't
10 hear it. You haven't heard it here today either. You have
11 just heard this theoretical argument that it could be
12 different, but it is not. And it is a fact.

13 And, again, they have three experts on this and they
14 were all deposed and they all wrote long reports and they all
15 could have said there is a difference in the particular
16 embodiment and none of them did it and we have asked twice now
17 for the evidence that it makes any difference whatsoever and
18 you haven't gotten it. You have just gotten vague
19 generalities, and that is what they want to do to the jury is
20 bamboozle them with something they are not going to
21 understand. Unless they can say that it is not a TCM
22 encoder -- if it said a TCM encoder, it would be different.
23 It says a half-rate TCM encoder in which the mapper, as Dr.
24 Mosen says is trivial. It is the equivalent of multiplying
25 by one. It makes no difference.

1 The argument that it won't work is belied by the
2 fact that defendants' devices all work and use exactly this
3 structure, so there is simply no evidence. You can't create a
4 material issue of fact by talking generalities. And, perhaps,
5 you should try a third time, but where is the evidence? They
6 won't talk about a half rate. That is why Dr. Wicker wouldn't
7 talk about a half rate because he couldn't. He was too
8 honest. The others were honest, too. They just talked
9 theoretically; it could make a difference, it could make a
10 difference.

11 Euclidean distance, when you have only got two bits,
12 the Euclidean distance is derogare. There is no issue there.
13 There is nothing to map. There are no uncoded bits coming out
14 of the half-rate convolutional encoder. There are no uncoded
15 bits coming out of the half-rate TCM encoder, so there is no
16 issue of fact here. It is just all generalities. And our
17 experts were very specific. And unless they can meet it, it
18 doesn't create a question of fact.

19 On interleaving, that is a claim construction issue.
20 It is a dependent claim. Your Honor has found that bits
21 equals blocks and that blocks can be single bits, which means
22 that you can understand the structure. The di-bit interleaver
23 is the one that is appropriate for QPSK modulation, but the
24 argument that you can't change the interleaving scheme is
25 totally untrue because you just undo the order. As long as

1 the receiver knows the original order it doesn't matter. You
2 do need to separate them; but as long as the algorithm on the
3 receive side is the same as the algorithm on the send side,
4 you put them back together, you get to exactly the same place.

5 But this is precluded by claim construction. That
6 has already been decided, affirmed by the Federal Circuit.
7 That is a question of law for the Court on claim construction,
8 so that one, it seems to me, has already been decided.

9 Finally, as far as the 4,000, their own experts said
10 that 800 nanoseconds was the largest delay spread he could
11 find in a factory building. So the idea that somewhere in the
12 world there is some possibility of it being longer is simply
13 not true.

14 THE COURT: Okay. Thank you.

15 All right. CSIRO's motion for summary judgment of
16 infringement is going to be taken under advisement. CSIRO's
17 motion for inequitable conduct, Docket No. 376 in the 549 case
18 and 442 in the 550 case and 324 in the 551 case, is denied.

19 MR. CORDELL: Your Honor, could I just ask for a
20 30-second rebuttal just because Mr. Furniss --

21 THE COURT: All right.

22 MR. CORDELL: -- threw the spear in the sand. I
23 disagree with him. Williams and Bims both addressed the very
24 issue he is asking about, whether we show additional data
25 reliability means -- or data reliability enhancement with TCM.

1 But I am pointing again back to the patent. The
2 patent itself tells us that. The patent tells us that TCM
3 gives you improved error-correction capability. That is what
4 CSIRO wrote in its patent. We don't have to go to any expert,
5 we don't have to go anywhere outside the patent. It is right
6 there.

7 Also recall that the TCM encoder that they are
8 talking about here is systematic. One of the bits that comes
9 in gets preserved on the output. That is not true for the
10 accused convolutional encoders. So when Mr. Furniss talks
11 about the Euclidean distance and the Hamming distance, I am
12 sorry we even got into that because we know fundamentally
13 these two things work in a different way. So all of his
14 comments were relating to the result that might be achieved,
15 but he has ignored the structure itself and the way that they
16 operate. He has got to address that if he wants to make out
17 equivalents under 112, paragraph 6.

18 Thank you.

19 THE COURT: All right. I believe that deals with
20 all of the summary judgments. Am I correct? Anybody have
21 anything else?

22 All right. The final thing I have on my list are
23 objections to exhibits and depositions, and I am going to
24 instruct the parties to get together and meet and confer on
25 those and try to get those boiled down. I'm going to instruct

1 you to have somebody with authority there in those
2 meet-and-confers that can make the decisions. Let's get this
3 thing boiled down to really the exhibits and deposition --
4 depositions that are really going to be introduced into the
5 case.

6 I'm not going to rule on any of this line by line.
7 If the parties need any general guidance as to questions, I
8 will be glad to provide that if you have particular areas that
9 you think need some direction in.

10 MS. ANDERSON: Thank you, Your Honor. This is
11 Christa Anderson for Intel. Your Honor, we would appreciate a
12 little bit of guidance on one issue related to exhibit
13 objections which I raised with CSIRO's Counsel a few days ago.

14 Just to give the Court a little bit of history why I
15 am asking for help here, in October of last year we issued a
16 30(b)(6) notice to CSIRO asking for testimony on a number of
17 subjects. One of those subjects was to ask CSIRO to put up a
18 witness to testify about any facts CSIRO might be aware of
19 that relate to whether or not a particular prior art reference
20 is a printed publication.

21 We did this for a number of reasons. CSIRO attended
22 conferences where patents have been presented, et cetera. We
23 believe they have knowledge. We engaged in a long series of
24 meet-and-confers with CSIRO's Counsel. They did not want to
25 put up a witness on that topic and we negotiated and agreed

1 that they could instead simply respond to an interrogatory
2 that we agreed on the language of. And the interrogatory
3 basically said CSIRO please tell us to the extent that you
4 dispute that one of our pieces of prior art is a printed
5 publication, state any facts that you are aware of that either
6 support publication or suggest that it wasn't published,
7 anything you might have in your knowledge. And we have tried
8 very hard to get full and complete answers out of CSIRO to
9 that interrogatory to put to rest this issue that has been
10 going on for months.

11 We received the last round of their responses from
12 CSIRO over the weekend, and it still does not respond fully to
13 this interrogatory, and we really believe, just like we are
14 entitled to know which products are actually being tried in
15 this case, we need to know if they have facts that relate to a
16 printed publication or if they can stipulate, great. But if
17 they are going to dispute the fact of printed publications, we
18 are entitled to know facts in their knowledge. We would
19 really appreciate if CSIRO's Counsel could provide that
20 information. Any assistance the Court might give us would be
21 very much appreciated.

22 MR. FURNISS: We stipulated to over 30 references as
23 being prior printed publications; and on the rest -- the
24 interrogatories say we don't have any information. These are
25 the references that they dug up. It is their burden. And we

1 have said -- for example, there is a conference paper. We
2 have said you have got to prove that it was there -- CSIRO
3 doesn't have any information. If anyone was there, they don't
4 remember it. But there is no further information about it.
5 We stipulated to over 30, I believe, and we stipulated to
6 every one that we had any information on.

7 The other thing, of course, is that this 30(b)(6)
8 was issued on the last day of discovery after all of our
9 people had been deposed. We brought a lot of them here. Went
10 to Australia. Everybody was deposed for two days. And all of
11 a sudden a new interrogatory that says tell us everything you
12 know about printed publications. But the answer is we have
13 told them everything we know about printed publications

14 MS. ANDERSON: Two quick points in response. First
15 of all, the interrogatory response CSIRO has provided is not
16 complete. They do stipulate to certain things as printed
17 publications, but what they don't tell us -- which is what we
18 have been trying to get at for months now -- is to the extent
19 that you dispute and you actually have facts that might
20 support the fact of publications, narrow references -- we
21 know their representatives were at conferences where the
22 papers were presented. We want your facts in an interrogatory
23 response. If you won't put up a witness in depo, what is
24 there within the scope of your knowledge.

25 We know CSIRO has been investigating which ones were

1 printed publications and have searched libraries and gathered
2 facts -- some of which we only learned of after the close of
3 discovery. This seems to be simple. If CSIRO has no facts
4 within the scope of their knowledge, they should be required
5 to state --

6 THE COURT: I think he just did.

7 MR. FURNISS: I did, Your Honor.

8 MS. ANDERSON: Thank you, Your Honor. In the
9 interrogatory response CSIRO does not state that -- given what
10 we have learned from the informal conversations we have had
11 and from other depositions, we know they have facts about some
12 of these disputed publications yet won't put them in a
13 response.

14 MR. FURNISS: We have said they put out a piece of
15 prior art -- and as I said we have stipulated to 30 of them.
16 It is clear they were public, but the idea there is any
17 information, at best it is their burden so it is a contention
18 that you haven't proven it as a printed publication. How do
19 you prove a negative? In other words, a reference we have
20 never seen, we don't have any witness going to take the stand
21 and say I was at this conference and it wasn't given out, no
22 such -- not aware of any such information. Our interrogatory
23 answer does state we have given them everything. They are
24 trying to shift the burden to us to prove there weren't
25 printed publications, but there is nothing further there. My

1 people don't recollect some conference in 1992.

2 MS. ANDERSON: Your Honor, we absolutely are not
3 trying to shift the burden. If it were a defense to discovery
4 to say it is not my burden not to answer your interrogatory,
5 we wouldn't have answered a lot of interrogatories in this
6 case. All we are asking for is a single reference -- and it
7 was stated about this big conference. They don't make any
8 reference at all in their interrogatory response to that. We
9 know they have inquired about the Shu reference. They make no
10 reference to it. We are simply requesting a response. As for
11 the timing of when we issued notice, CSIRO issued depo notices
12 after we did.

13 THE COURT: Well, it sounds to me like you have an
14 answer. You may have suspected something else is out there.
15 Mr. Furniss is saying there is not. At the time of trial they
16 are going to be held to their interrogatory answer. If he
17 comes in with something else that he knew about earlier, he
18 won't be allowed to put it in.

19 MS. ANDERSON: Thank you, Your Honor.

20 THE COURT: Understood?

21 MR. FURNISS: Yes, Your Honor.

22 THE COURT: Any other general guidance that I can
23 give you other than deposition and --

24 MS. ANDERSON: We are working hard trying to work
25 them all out.

1 THE COURT: Very good. Is there anything else from
2 plaintiffs that they would like to bring to the Court's
3 attention or need any guidance on by way of pretrial?

4 MR. FURNISS: There are some issues in the limine
5 motions, but I assume that is a new topic.

6 THE COURT: Oh, yeah. Okay. What else other than
7 that?

8 MR. VAN NEST: I have one simple thing, Your Honor,
9 and that is just to inquire of the Court, is it the Court's
10 plan to play the Judicial Center patent video to jurors?

11 THE COURT: It will be played for the jury before.

12 MR. VAN NEST: Play that before openings?

13 THE COURT: Right. It will be played before voir
14 dire to the entire panel.

15 All right. What do we have by way of limines? Are
16 they pretty extensive? Are y'all still meeting and
17 conferring? Does that need to be resolved today prior to voir
18 dire.

19 MR. GILCHRIST: Your Honor, we did -- Ms. Anderson
20 and I were up late last night. We do have quite a few
21 agreements that we have made. I am Greg Gilchrist, by the
22 way. It is a pleasure to be here. We can, I think, continue
23 working if you would rather us to do that and perhaps submit
24 some sort of joint brief about what is left in dispute. There
25 are quite a number of the plaintiffs' motions in limine that

1 have been worked out. We have agreed to some of theirs, but
2 there is still 15 or 20.

3 THE COURT: But I guess my question is, do all of
4 these need to be resolved prior to voir dire?

5 MS. ANDERSON: No, Your Honor.

6 MR. GILCHRIST: I don't believe so, no. And your
7 rulings today will help us resolve --

8 THE COURT: Why don't y'all -- excuse me, Mr.
9 Furniss, go ahead.

10 MR. FURNISS: Well, there is one I think that needs
11 to be resolved probably just so the parties can prepare, and
12 that is the defendants want to prohibit any reference to speed
13 or anything to do with the patent itself. They have made a
14 motion to say you can't talk about a high-speed wireless LAN,
15 you can't refer to speed. Now, it is very difficult for us to
16 prepare the case and, frankly, it is a summary judgment motion
17 because the entire object of this invention is to come up with
18 a high-speed wireless LAN. There were slow-speed wireless
19 LANs going back. That one I really think should be denied. I
20 don't understand it.

21 MR. VAN NEST: Your Honor, there are a number of
22 them that I think need to be resolved before opening but not
23 before voir dire. What we would suggest is, perhaps, we need
24 to continue the meet-and-confer process. We have agreement on
25 a lot of them but certainly not all. There are several

1 important ones that need to be decided. Maybe we could get an
2 hour or so of the Court's time that week of the 6th -- between
3 the 6th and 13th to resolve anything --

4 THE COURT: I understood Mr. Furniss to say that he
5 is concerned about this high-speed issue with regard to voir
6 dire.

7 MR. VAN NEST: I don't think it has anything to do
8 with voir dire.

9 MR. FURNISS: Well, in doing things like estimating
10 witnesses. There is an awful lot preparation. This one is so
11 fundamental. As I say, if we can't talk about speed that is
12 the object of the invention, I don't know how to comply with
13 the Court's ruling on witnesses if that is going to be the --

14 MR. VAN NEST: We can certainly argue that one, Your
15 Honor.

16 THE COURT: All right. Go ahead.

17 MS. ANDERSON: Yes, Your Honor. The quarrel that we
18 have with what CSIRO appears to be intending to do at trial is
19 that instead of addressing the actual limitations of the
20 claims and using those as the nexus for arguing things like
21 secondary considerations and the like for invalidity, CSIRO
22 treats the patent as if it is about power and consumption and
23 size and speed. It is not.

24 And there are witnesses such as Dr. Bantz who
25 acknowledge that all of the limitations of the patent existed

1 in the prior art before he supposedly saw and heard about
2 CSIRO's invention in 1992; yet he says while these elements
3 have existed in the prior art before, CSIRO had some new way
4 of doing it that was fast or was good in regards to the power
5 consumption and you know was small, could be built inside of a
6 small structure.

7 None of those are limitations of the claims, and
8 that kind of evidence will mislead the jury into believing
9 that what CSIRO's patent is about is about building a small
10 chip that doesn't use a lot of power. That is not claimed by
11 this invention. What is claimed by this invention is
12 particular techniques, multicarrier modulation, di-bit
13 interleaver, TCM encoder. That is the only kind of
14 limitations that matter in terms of assessing things like
15 secondary considerations of non-obviousness, yet many of the
16 witnesses, especially Dr. Bantz, all of his testimony revolves
17 not around the limitations but about his argument that CSIRO
18 had somehow built some kind of prototype or idea for how to do
19 something that already existed in the art before.

20 That is 403. That is misleading because what CSIRO
21 would like to say is we have come up with some special way to
22 build a smaller chip. That was not the patent. And to
23 mislead the jury that way distracts the jury from the real
24 issue. The real issue is whether or not those limitations
25 existed together in the art beforehand; and to suggest that

1 some special power relationship or size of the chip is what
2 CSIRO's invention was, will completely confuse this jury and
3 be very prejudicial to defendants.

4 THE COURT: Response?

5 MR. FURNISS: Your Honor, my motion is directed to
6 speed. Now, the questions about power consumption and those
7 kinds of things were part of the reason why Dr. Bantz didn't
8 think it would work, but that is his point. But speed is the
9 object of this invention. In other words, we can't even talk
10 about the patent. This is why the patent is an improvement.
11 The evidence will show that everyone else was using a single
12 carrier. Not an OFDM. Not a multicarrier system. There will
13 be Extensive evidence that people rejected it for a variety of
14 reasons. In fact, in a huge conference in 1996 no one even
15 mentions it.

16 So the issue here, the improvement in this patent is
17 to go multicarrier, which no one else did; no one. And if we
18 can't talk about the speed -- that is the object of the
19 invention. You might as well just throw the patent away.

20 THE COURT: Are you opposed to them talking about
21 speed?

22 MS. ANDERSON: Well, yes to the extent his witnesses
23 are suggesting that is CSIRO's invention. That is not CSIRO's
24 invention. The invention is defined by the limitations.
25 Speed has nothing to do with this invention. It is not a

1 claim. It is not one of the limitations of any claim. And to
2 suggest to the jury that CSIRO's invention was so novel and
3 special because it was fast, is telling the jury that there is
4 a limitation there that doesn't exist. There is nothing in
5 this Court's claim construction about speed, and there
6 shouldn't be because there is nothing in the limitations about
7 it.

8 And if CSIRO's Counsel argues to the jury that what
9 was novel about this invention is speed, that is extremely
10 misleading and very prejudicial to the defendants when that is
11 not an element, especially when we are trying at the same time
12 questions about invalidity. There were many prior art
13 references that disclosed the combination of these techniques,
14 including multicarrier modulation. And CSIRO suggesting to
15 the jury that this patent is about speed, will lead the jury
16 to think, oh, if that prior art wasn't particularly fast, I
17 guess it doesn't anticipate and I guess it isn't an obvious
18 combination. That, again, is very misleading to the jury in
19 403 and prejudicial to the defendants. Nothing in the patent
20 says speed. Now, to suggest that it is will lead certainly to
21 the jury to look at the prior art and say, well, where is the
22 speed, I need to compare speed, they simply can't do that
23 because there is no limitation to that effect.

24 MR. FURNISS: Your Honor, Ms. Anderson is confusing
25 the claims and how you execute it from the object of the

1 invention. In Column 1 of the patent, Line 50, "Such wireless
2 LANs are known; however, hitherto, they have been restricted
3 to low-data transmission rates. In order to achieve
4 widespread commercial acceptability, it is necessary to have a
5 relatively high transmission rate." That is the whole
6 purpose. You don't do this invention.

7 Now, it is clearly relevant -- I agree on
8 anticipation because you look at the claims, speed is not
9 relevant. But on obviousness speed is very, very relevant.
10 The Harris modem that they want to say renders the patent
11 obvious had a maximum bit rate of 2400 bits, not kilobits, not
12 megabits; 2400 bits. So they want to preclude us from arguing
13 that someone of skill in the art would look to a very, very,
14 very slow outdoor system in order to develop a very, very,
15 fast indoor system when at the time there were indoor systems
16 that went a thousand times faster than the Harris modem. That
17 is clearly a relevant argument.

18 The other argument on speed is that is why this is a
19 commercial success. That is why it is used all over the world
20 because it is faster. So it is not in the claims, but the
21 claims are what allow you to achieve that result. So it is
22 highly, highly relevant. To not talk about speed, how are you
23 going to even explain the multipath problem. If you go slow
24 enough, there is no multipath problem.

25 THE COURT: All right. The motion in limine is

1 denied as to that particular one. Any others that you need
2 guidance on?

3 All right. Y'all meet and confer. We are set for
4 jury selection on the 6th. Why don't you have into me by the
5 preceding Thursday at noon what your -- where you are on your
6 objections and kind of a status report as to what is agreed to
7 and what is still at issue. And I may try to make some time
8 available after jury selection to deal with whatever is left.
9 Okay?

10 MR. CORDELL: Your Honor, if I could just seize the
11 floor for a moment. Mr. Furniss asked me to respond to a
12 direct question. I want to make sure that I do that without
13 leaving today. In the Bims Declaration at Paragraph 66
14 through 71, which is attached to our opposition, is one
15 example where they specifically address that 1/2 TCM question
16 that he asked.

17 THE COURT: Okay. Thank you.
18 Anything further?

19 MR. FURNISS: No, Your Honor.

20 THE COURT: All right. Very well. The attorneys in
21 the CSIRO case will be excused. The attorneys in the Nissan
22 case, if I could see you in chambers.

23 (End of hearing.)
24

25 C E R T I F I C A T I O N

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2 I certify that the foregoing is a correct transcript from the
3 record of proceedings in the above-entitled matter.

4

5

6 /s/ Shea Sloan

7 SHEA SLOAN, CSR, RPR
8 OFFICIAL COURT REPORTER
9 STATE OF TEXAS NO. 3081

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